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IN THE

Supreme Court of the United States

October Term 1971.

Nos. 71-1016 and 71-1040

FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents.*

UNITED GAS PIPE LINE CO., ET AL., *Petitioners,*

v.

LOUISIANA POWER & LIGHT CO., ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STATE OF LOUISIANA AMICUS CURIAE

LOUISIANA'S INTEREST

Louisiana is the largest gas exporting state and the second largest gas producing state in the nation.[1] It delivers to other states 47.9% of all natural gas exported by producing states to meet the needs of other states which cannot supply their own requirements.[2] Louisiana marketed production of 7,227,826 trillion cubic feet of natural gas was 34.9% of United States production in 1969.[3]

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[1] Appendices A, B. and C, 1a-3a.

[2] Appendix A, 1a.

[3] Appendix D, 4a.

Over 73% of its total production is exported to other states, on a net delivery basis[4] During the last decade, gas exports have increased dramatically. Using 1960 as a base year, exports increased by 31.8% in 1965 and by 100.4% in 1970.[5]

In 1960, 31.5% of locally produced gas was consumed within the state. By 1965, this percentage declined to 27.2% and in 1970 to only 20.6%[6]

Plainly, Louisiana contributed more than its fair share to the national pool of natural gas and retains only a fifth of its own gas production for interstate use.

Historically, gas producing states have certain advantages over states which do not have their own gas supply. Their very proximity to the source of production attracts industries which use gas as the raw material without which their plants could not operate. The lower transportation costs of delivering gas to other industrial and commercial users within the state makes its use particularly attractive for such applications. It is not surprising, therefore, that producing states have a higher proportion of industrial-commercial consumption of total gas consumed and of firm gas than consuming states. Louisiana utilizes 84% of the total quantity of firm gas sold in the state for industrial and power plant generation purposes, in comparsion to a national average average of only 37%

Louisiana's economy is heavily dependent upon the availability of a firm, reliable and uninterrupted supply of natural gas. Statewide investment by industrial category

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[4] Appendix E, 5a.

[5] Appendix F, 6a.

[6] Appendix F, 6a.

[7] Appendix K, 11a.

clearly reflects the predominance of petroleum, refineries and chemicals which represented $465,297,370 or 76% of a total industrial investment of $609,578,850 in 1970.[8] Apart from these industries which use natural gas a process gas without which their plants cannot function, the state's electric utilities are completely dependent upon natural gas as fuel for electric generators.

Thus, the economic welfare of the state hinges upon the continued delivery of the volumes of gas it received and used prior to United's curtailment and upon the ability to draw upon greater volumes. Otherwise, its economy will be frozen at or below its present level. This is not true of other states in which natural gas plays a subsidiary rather than a dominant role in the overall economy of the state and in which the electrical utilities have alternate power sources such as coal, imported liquified natural gas and inexpensive hydroelectric power.

The state currently has an unemployment rate of 8.3% as of June 1971. This is the highest rate for the month of June since 1962. While the state rate was increasing, the national rate dropped to 5.6%.[9]

Other, more fortunately situated states, have as their principal economic assets resources which are neither depletable nor of only temporary value. Louisiana's wealth is in its oil and natrual gas energy resources, which are, by definition, a wasting asset. It is fact of life that each cubie foot of gas produced generates only one-time non-recurring income for

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[8] Louisiana Horizons, Publication of the Louisiana Department of Commerce and Industry, Winter, 1971, p. 5.

[9] Louisiana Labor Market, Department of Employment Security, June 1971.

the State of Louisiana. Furthermore, the cost of locating, drilling and producing natural gas in Louisiana is higher than the cost of producing gas in other states. Its gas wells are 50% deeper but cost twice the national average. Even dry holes in Louisiana are three times as costly as the national average.[10] Because of these unique and adverse factors, Louisiana's present predominance as a supplier of energy to the nation is exposed to a genuine and substantial threat that unlimited supplies of atomic energy used to generate electricity will, within the next two decades, supplant natural gas. Thus, if Louisiana is deprived of the opportunity to use an equitable share—which is far less than the share it exports—of its temporarily valuable natural gas resources, it will be inequitably and irreparably injured.

United Gas Pipe Line Company (United) operated an integrated interstate natural gas system extending across several states[11] before the enactment of the Natural Gas Act (Act). A grandfather certificate of public service and necessity covering the operation of such interstate facilities was issued on November 10, 1942.[12] United has also operated, on a completely separate basis, intrastate pipeline systems in Southern Louisiana which have always been regulated exclusively by the Louisiana Public Service Commission (LPSC). Such regulation has never hampered or impaired the effectiveness of regulation of United's interstate activities by the Federal Power Commission (FPC) and no such claim has been made.

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[10] *Louisiana Oil and Gas Facts,* Eleventh Edition, Louisiana-Arkansas Division, Mid-Continent Oil and Gas Association.

[11] United Gas Pipe Line Company, 3 FPC 562.

[12] Id., at 863.

United is the principal supplier of gas used within Louisiana. But, the share of the state's total gas requirements supplied by that pipeline has been consistently declining because it is using ever increasing quantities of state produced gas to meet the needs of its interstate customers.

In 1960, United supplied 61.4% of all gas consumed within the state. In 1965, it supplied only 58.6% of such gas. In 1970, it supplied only 47.5% of such gas.[13] In 1965, United had increased its exports of Louisiana gas by 6.5% from 1960. By 1970, however, this percentage had increased to 62.1%[14a] If this trend continues, and an assumption of certificate jurisdiction by the FPC is certain to accelerate it, gas volumes delivered to United's intrastate customers in Louisiana will be constantly and progressively diminished.

The FPC's assertion of power to reallocate firm direct sale gas to resale customers will have an abnormally severe impact on Louisiana. As Commission Carver noted in his dissent to Opinion No. 610, 68% of the gas volumes delivered in United's New Orleans District (Green System–East) represent direct industrial sales.[14b] Furthermore, only 110,797 million cubic feet of the total of 1,607,609 million cubic feet of firm gas used within Louisiana is applied to residential and commercial uses and purchased for resale.[14c] In addition, the FPC's assertion of further power to control the end-use of natural gas by ultimate consumers will have an equally disproportionate impact on Louisiana as compared to its impact on other states. In the nation as a whole, only 37% of all firm gas purchased is used for industrial and power plant genera-

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[13] Appendix F, 6a.

[14a] Appendix F, 6a.

[14b] United Pet., ftn. 1, 128a.

[14c] Appendix M, 13a.

tion purposes while the corresponding figure for Louisiana is 84%. Again, firm gas used for electric generation is 89% of all gas used for such purposes in Louisiana, as compared to 49% in the nation as a whole.[14d] The FPC's end-use test disregards the long established and universally recognized service priorities of firm over interruptible gas. Thus, although 93% of all gas used in Louisiana is firm, as compared with a national average of 69%[14e] it will bear the economic burden and dislocation of United's curtailments to a far greater extent than other states served by this pipeline.

Apart from these considerations, the FPC's arbitrary and capricious refusal to even consider the State's suggestion of a nationwide allocation proceeding to fairly distribute interstate gas supplies between states, leaving to such state the responsibility for controlling the end-use of gas by its own citizens, casts its so-called curtailment plans in a framework which ignores such oppressive and severe discrimination and excludes any consideration of the equities of a producing state.[14f] Finally, United's Louisiana customers obtain all of their requirements from this pipeline; have no peak shaving facilities or underground storage. By way of contrast, its resale pipeline customers and their distributor customers obtain only part of their requirements from United and have both

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[14d] Appendix L, 12a.

[14e] Appendix M, 13a.

[14f] Opinion No. 606-A in the curtailment case denied the State's request, on rehearing, that the issues remanded to the examiner to encompass consideration of such matters on the basis of a single sentence comprising the circular statement that "... we have determined that the proper scope of this proceeding is that set forth in Opinion 606." Commissioner Carver dissented from the denial of rehearing principally because he felt that the FPC had missed an opportunity to correct some of the extravagances of its jurisdictional assertions (Sol. Gen. Pet., 89a).

peak shaving and underground storage capabilities.

In an "Environmental Impact Statement" submitted by United in the curtailment case on March 24, 1972, it admitted that Gulf States customers have borne the brunt of its curtailments, stating:

> "*The curtailment of United's deliveries to city gates, power plants and industrials within the Gulf-South from Texas to Florida, as shown in EIS Exhibit 1, has, to date, indirectly resulted in the only substantial impact upon the environment in any way attributable to United's curtailment program, since United's pipeline customers have been able to offset the effect of United's curtailment by utilizing alternate sources of gas.*[1] The geographical distribution area served by these pipeline customers may also be taken into account because United's average day curtailment is spread equitably among all of United's direct and indirect customers. As noted, however, the primary effect of United's curtailment program is in the area served directly by United."

1 Natural Gas Pipeline Company of America is an exception, but it obtains only a very small part of its total requirements from United." (Emphasis added).

Furthermore, the gas volumes reallocated from Louisiana direct sale customers to resale customers are used to meet the needs of *industrial*—not *domestic* and *commercial*—customers in other states. United's initial brief to the FPC blandly admits that:

> "The pipelines have significant interruptible loads which are served both directly and indirectly through distributors (tr. 3270). Sales to these *interruptible* loads have continued in very substantial

quantities despite United's curtailment (Item by Reference Z)." (Emphasis added).

In other words, the purpose of United's curtailment plans is to divert *firm* direct sale gas to *interruptible* industrial consumers served by its pipeline distributor resale customers.

SUMMARY OF ARGUMENT

I

THE FPC HAS NO STATUTORY POWER TO REALLOCATE THE GAS SUPPLIES OF DIRECT SALE CUSTOMERS TO RESALE CUSTOMERS

A. The FPC asserts an urgent need for statutory authority to override the terms of direct sales contracts in times of emergency caused by a pipeline's inability to meet its contract committments to deliver firm gas. The thrust of the arguments is that this court must construe the Act broadly, and in disregard of the deliberate and meticulous exclusion of direct sales from the scope of the agency's regulatory powers by Section 1(b), because a new and unforeseen situation has created an emergency. But, Congress was fully aware of the total dependence of pipelines and their customers upon a depleting asset in finite supply. Section 7(b) is the only provision of the Act which specifically refers to gas shortages and it permits an abandonment only upon findings of depletion of the gas supply or that the public interest permits such action. Certificates of public convenience and necessity are granted only upon a showing of satisfactory gas reserve lives and deliverability volumes.

All direct and resale contracts contain impairment of deliveries terms establishing definite service priorities between classes of customers and fixing the rights and liabilities of the seller and buyer when the pipeline improvidently assumes obligations to deliver firm gas in quantities exceeding either its gas supply or transmission capacity. Congress intended interstate pipelines to have an absolute and unconditional obligation to meet such firm delivery commitments. This explains why it did not equip the FPC with express statutory powers to deal with the abnormal and extraordinary situation of either an individual pipeline systemwide, or a nationwide, gas shortage. Congress delegated express emergency authority to deal with shortages of electrical energy to the FPC in Sections 202(c) and 202(d) of the Federal Power Act. This omission was deliberate and reflected an awareness of the vital differences between the natural gas and electric utility industries.

The FPC has repeatedly, and unsuccessfully, sought an amendment of the Natural Gas authorizing it to safeguard the available gas supply in emergency situations.

B. Petitioners admit that the FPC lacks rate and tariff jurisdiction over direct sale contracts. Nevertheless, the FPC's order No. 431 required United and all other pipelines to file curtailment plans applicable to such contracts as tariffs. Thus, despite its disclaimer of jurissdiction, the FPC is changing the terms of such contracts by a method clearly proscribed by Section 1(b). In asking Congress to amend the Act by granting authority to regulate the *price* and *other terms*, of such contracts, the FPC has twice admitted that it has no such statutory authority.

C. The FPC is seeking to improve upon the provisions of the Act, by asserting plenary jurisdiction in an area where it has been expressly granted only limited jurisdiction over the gas delivery obligations of pipelines. Sections 4 and 5 of the Act authorize the regulation of *service* as well as of *rates*. The

prohibitions against undue preference or advantage between customers and against unreasonable differences in services between localities or classes of service apply to the allocation of inadequate mainline transmission capacity of an interstate pipeline, among its resale customers (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, 789 (CA 6); *Michigan Consolidated Gas Co.* v. *FPC*, 203 F.2d 895, 901 (CA 3); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.2d 675, 679 (CA 3)). Such authority can only be exercised upon express findings that the pipeline's service priorities are unduly preferential or discriminatory. No such findings have ever been made with respect to either United's direct sale or resale impairment of delivery contract terms.

Both the plain language and structure of Sections 4 and 5 of the Act limit the FPC's powers to regulate rates and services to gas delivered by an interstate pipeline to a resale customer. The term "persons" in Section 4(b)(1), and the powers of the FPC to change unduly discriminatory or preferential rate designs under Section 5(a), are limited in scope to resale rates affecting gas distributors and the ultimate consumers purchasing from them. (*Fuels Research Council, Inc.* v. *FPC*, 374 F.2d 842, 852-853).

D. Petitioners claim that if direct sale customers obtain gas for industrial purposes while resale customers are unable to meet all of their needs for domestic and commercial use, there will be an undue preference to the former class of service. On this premise, they argue that the Court of Appeals holding that the FPC lacks curtailment jurisidction over direct sales is inconsistent with, and undermines, the agency's jurisdiction under Sections 4 and 5. However, the FPC lacks statutory authority to consider the end-use of gas or conservation factors in proceedings under Sections 4 and 5 (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 608-614; *Fuels Research Council, Inc.* v. *FPC*, 374 F'2d 842, 853-854 (CA 7); *City of Detroit* v. *FPC*, 230 F.2d 810, 816-817 (CADC)).

Plainly then, the FPC cannot establish priorities, regulating different classes of end-use by ultimate consumers, in the exercise of its rate and tariff jurisdiction. Nor can it eliminate price discrimination between resale and direct sale customers to equalize rates and charges between these classes of service. (*Panhandle Eastern Pipe Line Co.* v. *FPC* 324 U.S. 635, 647). By the same token, it cannot remedy service discrimination arising from more favorable impairment of delivery terms in direct sale contracts.

E. The FPC has no statutory authority to reallocate gas supplies between direct sale and resale customers or to control the end-use of natural gas by ultimate consumers. In *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 17, this Court held "... the Commission's powers under Section 7 are, by definition, limited..."; it "...cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weight against certification." An effort by the FPC to reallocate the portion of the mainline transmission capacity of an interstate pipeline in excess of its delivery commitments to firm customers from direct sale industrial users to resale customers was held unlawful under Section 7(a) of the Act because it would impair the pipeline's ability to render adequate service to its existing customers. In that case, the FPC was exercising its Section 5(a) authority to eliminate unduly discriminatory or preferential practices or contracts and its Section 7(a) authority upon a finding that it was in the public interest for the pipeline to supply additional capacity to its resale customers. (*Granite City Steel Co.*, v. *FPC*, 320 F.2d 711, 713 (C.A.D.C.)

F. There is no merit to the FPC's novel and unprecedented theory that it has concurrent and coextensive jurisdiction over interstate transportation and sales for resale under Section 1(b). This reading of the Act is designed to

evade the prohibition in the very same section against regulation of any aspect of the prices and terms of direct sales. This is an argument that the FPC can achieve indirectly what Congress has prohibited it to do directly.

In any event, Section 1(b) is not a grant of any self-executing substantive power. Rather, it is a mere definition of the scope of the regulatory powers conferred by the Act which is cast in terms of the types of transportation and sale transactions Congress committed to federal regulation and reserved to state regulation. Each of the substantive sections of the Act empowers the FPC to regulate a different subject, and the individual powers thereby conferred must be exercised in accordance with the specific procedures prescribed by Congress. Furthermore, in implementing its powers under any section of the Act, the FPC cannot claim implied power which was expressly withheld in another section of the Act. (*Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.†d 675, 679-680 (CA 3); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 247 F.2d 306, 310-313 (CA 3)).

In a completely parallel situation, this Court has specifically condemned an attempt by the FPC to combine Sections 1(b), 4, 5, 7, and 16 for the purpose of circumventing a specific exemption in Section 1(b), concerning production or gathering (*FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 504, 507-508).

G. Petitioners' attempts to imply coextensive and concurrent power over transportation and sale also run afoul of the interrelationship between the certificate and rate sections of the Act. Section 7 is the statutory vehicle for initially dedicating natural gas supplies to interstate movement and for initially authorizing the use of pipeline facilities for the interstate transportation or sale of such gas supplies. The powers granted to the FPC in Section 4 and 5 only become operative after such initial certification of natural gas in inter-

state commerce by means of a permanent certificate. This very contention was specifically rejected in *United Gas Pipe Line Co.* v. *FPC*, 388 F.2d 385, 388 (CA 5), where the FPC justified its classification of wholly unregulated direct sales as regulated business activities, for the purpose of applying its consolidated tax return savings formula, on the ground that such sales were subject to its certificate jurisdiction with respect to transportation. The Court of Appeals held that the FPC's "certificate jurisdiction is not the same as its rate jurisdiction".

In any event, even if the FPC had coextensive and continuing jurisidiction under the certificate and rate sections of the Act, its claimed power to reallocate gas supply volumes would only be exercised if such transportation authority is of a *continuing* nature. But, it is hornbook law that an administrative agency cannot alter or amend a previously issued permanent certificate in order to implement a changed regulatory policy unless its enabling act specifically provides for modification or revocation of such certificates (*United States* v. *Seatrain Lines*, 329 U.S. 424, 428-432; *American Trucking Association* v. *Frisco Co.*, 358 U.S. 133, 146; *Watson Bros. Transportation Co.* v. *United States*, 132 F. Supp. 905 (D.C. Neb.) aff'd. 350 U.S. 927). The FPC's reallocation of gas supplies is such a change in policy and the act does not confer such authority.

H. United filed with the FPC tariff provisions, applicable for the first time to its direct sale customers and to its resale customers served by the separate intrastate pipeline systems in Southern Louisiana regulated by the LPSC and in derogation of their contract rights, which the agency made effective without any statutory findings that the existing contract terms were unduly preferential or discriminatory or that the revised terms were fair and lawful. But, the FPC cannot utilize the tariff revision procedures of Section 4 to change either the rates or terms of service rendered to even interstate

resale customers subject to its jurisdiction, unless they have consented to such unilateral changes by pipeline suppliers in their contract rights. (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 333, 342-344; *United Gas Pipeline Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 112-113). The FPC seeks to evade the rule of *Mobile* on the strained and tenuous theory that although a pipeline cannot unilaterally change the terms of its contracts governing service priorities in the event of a gas shortage, the agency may order such companies to formulate curtailment plans reallocating their gas supplies from direct sale to resale customers and to file such plans as tariffs. This is a brazen and transparent attempt to circumvent the express requirement of Section 5(a) that as a condition precedent to the exercise of its power to prescribe any rate, practice or contract the agency must find the existing tariff provision unlawful.

I. Petitioners claim that unless that the FPC has power to override the terms of direct sale contracts dealing with impairment of deliveries, there will be an "attractive gap" in the regulatory scheme.

However, Congress committed to the exclusive regulatory control of the states the rate, licensing and service aspects of direct sales made by use of the interstate facilities of a jurisdictional pipeline (*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 512, 513-514, 516-519; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 333-337). The Act withheld from the FPC power to remedy undue discrimination or preference between such state regulated direct industrial consumers and federally regulated resale distributors and pipelines, and the industrial consumers they serve, because the granting of such power would have invaded the constitutional prerogatives of the states to regulate such commerce which have not been limited by the Act. Thus, the FPC's regulation of direct sales violates the Act and invades powers reserved to the States

under the Tenth Amendment to the United States Constitution.

Apart from these considerations, the FPC's individual pipeline company systemwide basis for rationing and reallocating gas deliveries creates, rather than corrects, undue and unlawful discrimination and preference between end-users of the same class in each state and in different states. It can insure, at most, only equal treatment to all customers of the same pipeline. It cannot afford equal treatment to end-users of the same class whether they are located in the same state or in different states. However, the State's suggested nationwide approach of allocating gas supplies to states, leaving to each state the responsibility for controlling the end-use of gas by its own citizens, would treat all states and localities fairly.

Moreover, the FPC is exceeding its statutory powers and invading prerogatives Congress deliberately left to the states when it seeks to control the end-use of gas by ultimate consumers. Each state is entitled to its own choice of service priorities and is not obliged to make them identical with those of other states. While admitting that it lacks jurisdiction to control end-use of natural gas by ultimate consumers, the FPC is unlawfully exercising such jurisdiction.

The State submits that the explicit language of the Act, which leaves no latitude for inference concerning Congressional intent; its clear legislative history; the consistent administrative interpretation of the Act by the FPC that it lacks power to change the price or terms of direct sale contracts and that agency's repeated and unsuccessful attempts to have the Act amended to grant such authority compel the conclusion that uniform federal regulation is neither appropriate nor lawful insofar as direct sales are concerned.

II

THE COURT OF APPEALS JUDGMENT THAT UNITED'S GREEN SYSTEM IS AN INTRASTATE PIPELINE WAS NOT AN ABUSE OF ITS JUDICIAL DISCRETION

The issue decided on the merits by the Court of Appeals was whether, by the self-serving and unlawful acts of United, this intrastate system has been converted to an interstate system to oust the LPSC of its lawful jurisdiction. This is not the normal situation of a dispute between a private party and a federal administrative agency concerning a matter within its established statutory powers to which the doctrine of exhaustion of administrative remedies applies. Rather, this is a controversy concerning conflicting and mutually exclusive claims of jurisidction between Louisiana and the Federal Power Commission. The supremacy clause of the Constitution is inapplicable to resolution of this issue unless and until the courts have rendered a final judgment in favor of the FPC. The FPC has no authority at all over intrastate commerce and Section 1(c) of the Act reserves regulation of intrastate pipelines and of local distribution systems entirely to state regulation. The FPC must defer to the states on matters of such primarily local concern.

Even if this case is regarded as a conventional injunction proceeding, the Court of Appeals did not abuse its judicial discretion. The cases cited by petitioners involve attempts by a private party challenging the jurisdiction of a federal administrative agency to enjoin or to otherwise terminate, by declaratory judgments, administrative proceedings concerned with the determination of so-called "jurisidictional facts" which will determine whether that party is subject to regulation. No such effort was made here and the administrative and judicial review process continue completely unimpeded and uninterrupted.

This Court has rejected the primary argument made here that the FPC is the sole competent judge of the scope of its own jurisdiction and that courts must defer to the pendency of its administrative proceedings until it can determine its own power and the necessity of its exercise (*FPC* v. *Panhandle Eastern Pipe Line Co.*, 172 F.2d 57, 59-60, aff'd, 337 U.S. 499, 514-515). Where an agency is clearly acting in excess of its statutory authority exhaustion of administrative remedies is unnecessary (*Leedom* v. *Kyne*, 358 U.S. 184).

Unlike the cases cited by petitioners, where the only exposure to injury of the parties seeking court relief was the burden and expense of participating in an agency hearing which this Court does not view as irreparable injury (*Petroleum Exploration, Inc.* v. *PSC*, 304 U.S. 209, 220-221), LPL alleged clear irreparable injury. The question of certificate jurisdiction was decided by the Fifth Circuit upon the basis of undisputed facts and purely as a matter of statutory interpretation and the applicability of judicial precedents. Such issues are within the specialized competence of the courts, not that of the FPC. If petitioners' exhaustion view has merit, the FPC's issuance of a final opinion and its denial of reharing moot the very procedural issue they seek to have reviewed by this Court.

ARGUMENT

I.

THE FPC HAS NO STATUTORY POWER TO REALLOCATE THE GAS SUPPLIES OF DIRECT SALE CUSTOMERS TO RESALE CUSTOMERS

A. THE FPC DOES NOT HAVE ANY EMERGENCY STATUTORY POWER TO RATION GAS DELIVERIES AMONG THE CUSTOMERS OF AN INTERSTATE PIPELINE BECAUSE OF A SYSTEM-WIDE OR NATIONWIDE GAS SUPPLY SHORTAGE

The FPC asserts that there is a "need for Commission authority to override the terms of the [direct sale] contract in times of emergency such as when a pipeline cannot meet its contractual commitment because of inadequate gas supplies."[15] The FPC also argues that its express statutory power to authorize abandonments under Section 7(b) of the Act is not sufficiently flexible to deal with temporary shortages of gas during a period of emergency,[16] although it pointedly ignores the possibility of a conditional abandonment which would permit resumption of full contract deliveries when the shortage ends. The thrust of the FPC's arguments, supported by United, is that this Court must broadly construe the Act in disregard of the deliberate and meticulous exclusion of direct sales from the scope of the agency's regulatory powers by Section 1(b) because a new and unforeseen situation has created an emergency. The State will demonstrate that Congress was fully aware of the

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[15] I.B. at 18.

[16] I.B. at 18-19, ftn. 15.

possibility of gas supply shortages when it enactedthe Natural Gas Act and has repeatedly refused the FPC's requests for express authority to deal with such emergency shortages.

The natural gas pipeline industry is completely dependent upon a depleting asset in finite supply. Congressional awareness of this circumstance is reflected in pivotal provisions of the Natural Gas Act designed to insure a dependable and uninterrupted supply of gas to the ultimate consumers served directly or indirectly by interstate pipelines.

Section 7(b) prohibits a partial or total abandonment of any facilities or service subject to FPC jurisdiction unless that agency authorizes such action, after application by the pipeline company, full evidentiary hearings and upon the basis of a specific finding that "... the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted" or that the public interest permits such abandonment. Both the FPC and the courts have held that this statutory protection encompasses a reduction in the volumetric quantities of gas delivered as well as a complete cessation of service (*Dixie Pipeline Co.*, 14 FPC 106, 114; *Panhandle Eastern Pipe Line Co.*, 22 FPC 679, 681 683-684; *Panhandle Eastern Pipe Line Co.*, 14 FPC 264 affirmed 236 F.2d 289 (CA.3); *Willmut Gas and Oil Co.*, v. *United Gas Pipe Line Co.*, 12 FPC 132, 138-139; *Panhandle Eastern Pipe Line Co.*, v. *Michigan Consolidated Gas Co.*, 177 F.2d 943, 945 (CA 6).

Section 7(a) authorizes the FPC to require extensions of pipeline transmission facilities to serve the needs of gas distributors in communities adjacent to such main lines but expressly prohibits any compulsory physical connection or sale of natural gas which would impair the pipeline's "... ability to render adequate service to its customers". The FPC has always insisted upon a showing that there are

adequate gas reserves firmly committed under contracts to support the construction and operation of any facilities or extentions sought to be certificated under Section 7(c)[17] and Section 157.14(a)(10) of the Regulations under the Natural Gas Act requires a comprehensive showing by the applicant to establish satisfactory gas reserve lines and deliverability volumes.

Both direct sale customers and resale customers of interstate pipelines have shown equal awareness of the need to protect themselves against the danger of a gas shortage in the event that their pipeline supplier improvidently assumes obligations to deliver firm gas in quantities exceeding either its gas supply or transmission capacity. Thus, direct sales contracts and resale tariffs invariably contain impairment of deliveries provisions establishing service priorities between different classes of customers and defining the respective rights and liabilities of the seller and buyer in the event of a failure to meet contractual delivery obligations.

Interstate pipelines differ from conventional public utilities because they are not legally obligated to meet service demands by potential new customers or to furnish additional service to existing customers. The Natural Gas Act leaves such companies free to choose their customers and to make voluntary business judgments concerning the expansion of their transmission capacity and the assumption of contract obligations to deliver additional volumes of gas.[18] Section 7(a) specifically withholds from the FPC the authority to compel the enlargement of transportation facil-

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17 *Trunkline Gas Co.*, 21 FPC 706; *Texas Illinois Natural Gas Pipeline Co.*, 24 FPC 980; *Tennessee Gas Transmission Co.*, 30 FPC 764.

18 *Panhandle Eastern Pipe Line Co.*, 204 F.2d 675, 680 (C.A. 3).

ities.[19] Pipeline transmission capacity and gas reserves has always been geared to the present and future needs of resale and direct sale customers.

These background considerations conclusively demonstrate that Congress intended interstate pipelines to have an absolute and unconditional obligation to meet their contract commitments to direct sale and resale customers and explain why it did not find it necessary to equip the FPC with express statutory powers to deal with the abnormal and extraordinary situation or either an individual pipeline with a systemwide gas shortage or with a nationwide gas shortage.

Congress was faced with a different situation in framing the statutory scheme of the Federal Power Act for the regulation of interstate electric utilities. Electricity is an intangible commodity whereas natural gas is a tangible commodity. Electrical energy cannot be stored whereas natural gas occurs in producing wells which are inherently storage facilities permitting withdrawal at known maximum deliverabilty rates. For these reasons, Congress specifically authorized the FPC to deal with emergency shortages of electrical energy in Part II of that Act. Section 202(c)[20] provides that during a war, or whenever the agency deter-

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19 *Central West Utility Co. v. FPC*, 247 F.2d 306, 310-313 (CA 3).

20 Section 202(c): During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation of transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by

(Cont. next page)

mines that an emergency exists by reason of a sudden increase in demands for electric energy or that there is a shortage of energy or of facilities or materials for its generation or transmission, the FPC shall require temporary connections of facilities and such other generation, delivery, interchange and transmission arrangements as well best meet the emergency needs and serve the public interest.

Section 202(d)[21] expressly exempts from FPC jurisdiction any temporary connections or facilities made or constructed to deal with such an emergency by an inter-

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(20 Cont.)

order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party. (49 Stat. 849; 16 U.S.C. 824a (c)).

21 Section 202(d): During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction; provided, that such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: Provided further, that upon approval of the Commission permanent connections for emergency use only may be made hereunder. (49 Stat. 849; 16 U.S.C. 824a(d)).

state electric utility. It also limits the duration of such temporary connections and construction to the period of emergency, and permits permanent connections for emergency use to be continued thereafter only upon specific approval by the FPC.

Congress delegated such express emergency authority to the FPC with respect to electric utilities on August 26, 1935. But, it failed to make any corresponding delegation of emergency authority in the Natural Gas Act enacted on June 21, 1938. *The State submits that this was not an oversight but a deliberate omission and attributable to Congressional awareness of the vital differences between the gas pipeline and electric utility industries.*

The FPC has long been aware that it lacked authority to deal with emergency situations arising from a shortage of natural gas. It repeatedly requested that the Natural Gas Act be amended "to provide specifically for control by the Commission of the end-use of natural gas when required for national defense or to safeguard the available supply" (31 FPC Ann. Rep. 145 (1951); 32 FPC Ann. Rep. 152 (1952) and 22 FPC Ann. Rep. 154 (1953)). For four years beginning in 1954, it requested narrower legislation "to provide specifically for control by the Commission of the allocation of natural gas when required for national defense or to safeguard the available supply in *emergency situations*" (Emphasis added). 34 FPC Ann. Rep. 170 (1954); 35 FPC Ann. Rep. 182 (1955); 36 FPC Ann. Rep. 18 (1956); 37 FPC Ann. Rep. 24 (1957); 38 FPC Ann. Rep. 16 (1958)). In January, 1970 the FPC again formally asked Congress to enact legislation granting it such emergency powers and this time it modeled the proposed legislation upon the pattern of the broad grant of authority to deal with a national emergency contained in Section 202 of the Federal Power Act. The FPC's Annual Report for 1970 summarizes this request:

"Spot shortages of natural gas which became apparent during the fiscal year and which are expected to to increase in the foreseeable future suggest urgent need for Congressional action to alleviate these problems and that the Commission's jurisdiction to do so should not be subject to challenge. This proposal which would add a new subsection to Section 7 of the Natural Gas Act would enable the Commission to determine when an emergency exists so as to require the construction of temporary connections of facilities and extensions of facilities and the delivery, interchange, transportation, *load curtailment and allocation of gas* by any gas company, whether or not it is otherwise subject to the Commission's jurisdiction. Undisputed authority to meet such crises as they arise is necessary for effective regulation of the natural gas industry (p. 8)." (Emphasis added).

These repeated and unsuccessful attempts to obtain explicit emergency powers caset grave doubt upon the FPC's present claims that it has plenary jurisdiction under its enabling Act to deal with the alleged nationwide gas supply emergency or with United's systemwide gas shortage.

The only provision of the Natural Gas Act granting emergency powers is the portion of 7(c)[22] which applies

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[22] Section 7(c): Provided, however, that the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

only to the limited situation where issuance of a temporary certificate, without notice or hearing, to a pipeline is necessary "to assure maintenance of adequate service to to serve particular customers" during the pendency of hearings. Such emergency authority cannot be utilized to impair adequate service or terminate service to particular customers under curtailment plans. This specific and limited authorization negates the FPC's effort to imply much broader and wholly different emergency powers which were requested from, but denied by, Congress.

In any event, the FPC's efforts to characterize the curtailment plans of United and other pipelines as attempts to deal with an emergency situation are inaccurate and misleading. Neither United nor such other pipelines have proposed that the reduction in contract delivery volumes be effective for only a specified and limited period of time. Rather, these pipelines have requested both thier direct sale and resale customers to execute new long term contracts permanently reducing their present delivery entitlements.

B. THE FPC HAS NO STATUTORY POWER TO CHANGE THE TERMS OF DIRECT SALE CONTRACTS GOVERNING DELIVERIES OF GAS DURING SHORTAGES

The impairment of deliveries provisions in direct sale contracts are "terms" governing the service provided in the event of a gas shortage. The FPC cannot abrogate and nullify these contract terms concerning the liabilities and rights of the pipeline and its direct customers merely because the contingency to which they are drawn has materialized. Any effort by this agency to regulate such matters is a direct and prohibited assertion of power over direct sales.

Both the FPC[23] and United[24] admit that the agency lacks rate jurisdiction over direct industrial sales. Nevertheless, the FPC's Order No. 431[25] required United to file a plan providing for the curtailment of direct sales in the form of new and amended tariff sheets which become effective, under the provisions of Section 4(e) of the Act, during the pendency of an investigation of the reasonableness and lawfulness of such plans. *Thus, despite its disclaimer of rate and tariff jurisdiction over direct sales, the FPC is changing the terms of direct sale contracts.* This clearly violates the express prohibition of Section 1(b) which excludes from the regulatory powers of the FPC any *regulation of sales for consumptive use.*

The FPC plainly lacks the authority to require a pipeline to file a tariff covering the price and terms of a direct sale because this would give it the continuing rate and service jurisdiction it exercises over *sales for resale* as opposed to the *initial* certification jurisdiction it has over *transportation.* An attempt by a divided FPC to require a pipeline to file a tariff applicable to direct sales contracts in order to obtain such continuing sales jurisdiction was found unlawful in *Colorado Interstate Gas Co.* v. *FPC,* 185 F.2d 357 359, 360 (CA 3), where the court stated:

> "The power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado

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[23] I.B. 22.

[24] I.B. 9.

[25] 36 Fed. Reg. 7505, FPC I.B., pp. 50-54.

> Interstate to make its gas tariff applicable to any sales other than those for resale. *It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory power of the Commission for this would be in effect to regulate such sales.* Indeed, the Commission itself recognized this in 1945 when in accepting Colorado interstate's earlier tariff changes for filing it specified that they were to be effective only for sales 'for resale for ultimate public consumption'." (Emphasis Added).

The FPC also cannot amend an interstate pipeline's filed rate tariffs to compel continued deliveries of gas under a resale rate schedule for the purpose of permitting the purchaser to divert such volumes from resale channels to direct consumptive use in a power plant. In *City of Hastings, Nebrasks* v. *FPC*, 221 F.2d 31, 32-33, 36-39 (CADC cert. denied, 349 U.S. 920) the court held such action beyond the scope of the FPC's statutory powers as a prohibited regulation of a direct sale, stating:

> "In effect, the Commission says when the City cancelled its contract for power plant gas, it put itself into the position of having no no contract for, and no right to; power plant gas, *and the Commission is unable to write a new contract for the parties. The Commission says it may not, because it cannot, although it has recommended to Congress that it be given authority to, regulate sales not now governed by the statute.* It therefore concludes that the complaint must be dismissed." (Emphasis Added).

As the District of Columbia Court of Appeals observed in *City of Hastings*, cited *supra*, p. 12, the FPC had re-

quested authority to regulate direct sales before 1954. Again, in 1963, the FPC recognized its lack of statutory authority to regulate either the rates or terms of direct industrial sales and asked Congress for such legislative authority:

> "At the time the Natural Gas Act was adopted in 1938, it was not believed that Commission regulation of the *rates and terms* of such sales was necessary to protect the purchasers from *discrimination* or unduly high rates, *or that such sales could have any adverse effect upon jurisdictional sales for resale.* Both of these views have proved to be incorrect in a significant number of situations. Thus, while the Commission is not suggesting that this type of sale if inherently improper or should be generally prohibited – on the contrary, in many situations they have been shown to be mutually beneficial to all interested parties – it is believed that bringing such sales within the range of Commission regulations would materially enhance the effectiveness of Commission regulation of natural gas in the public interest. (1963 FPC Annual Report, pp. 405). (Emphasis Added).

The FPC justified the proposed legislation by reference to the freedom of interstate pipelines under the Natural Gas Act to engage in discriminatory practices, respecting service, by preferring industrial consumers they served directly to industrial consumers served by their resale customers and by diverting natural gas from superior domestic use to industrial use.(Appendix N,14a-21a). In a letter dated June 12, 1963, from then FPC Chairman Joseph C. Swidler to President of the Senate Lyndon P. Johnson; the FPC stated:

> "Under existing law the Commission's au-

thority is limited to sales for resale in interstate commerce: hence, *the price and other terms* of a direct sale by a pipeline to an industrial consumer *are outside the sphere of this Commission's regulatory authority.*

"... the Commission strongly recommends that it be given jurisdiction over direct industrial sales by natural gas companies. This authority will enable the Commission to require that interstate industrial gas sales will be made at such prices *and on such terms* as to realize the potential benefits of such sales to both industrial and domestic consumers." (Cong. Rec. 11084, 11085). (Emphasis Added).

The FPC cannot cite a single agency decision, whether or not litigated in the courts, in which it has changed either the price or any term in a direct sale contract authorizing the interstate transportation of natural gas under a permanent certificate of public convenience and necessity.

C. THE RATE AND TARIFF SECTIONS OF THE ACT GRANT THE FPC LIMITED, NOT PLENARY, POWER OVER SERVICE AND APPLY ONLY TO RESALE CUSTOMERS

The FPC claims plenary authority to approve or prescribe "curtailment plans" which allocate reduced gas delivery volumes to both the direct sale and resale customers of an interstate pipeline in derogation of its contract and certificate obligations. Its exercise of such authority, which is asserted for the first time in its history, will have drastic and far-reaching consequences.

The FPC proposes to obliterate judicially sanctioned differences in treatment between existing and new customers and the universally recognized service priorities of firm

over interruptible customers. It has accepted for filing, and permitted to become effective pending a determination on the merits, the curtailment plans of United and of other pipelines which reduce gas deliveries to direct sales customers and reallocate such gas volumes to resale customers. Such curtailment plans are effective as to both *present* and *potential* gas shortages. While asserting an urgent need for such plenary authority to deal with a nationwide gas supply shortage, the FPC has permitted curtailments by pipelines who are not experiencing such a shortage but have elected to fail to proivde additional transmission capacity needed to meet firm contract obligations to existing customers because of the additional risk of investing in new or enlarged facilities when there is a possibility that potential future shortages will diminish profit margins.[26]

Furthermore, the FPC has made manifest its intention to insure that pipeline rates and charges for direct sale and resale service will be "fully compensatory" and thus provide financial incentive to encourage exploration for and development of new gas reserves.[27] The State submits that gas allocation proceedings are not the proper vehicle for dealing with this problem and that the alleged emergency is being used as a pretext to circumvent the limited powers of the FPC to relieve United of financial obligations to direct sale customers[28] which were profitable but no longer pro-

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26 *Order Suspending Proposed Tariff Sheets*, etc., p. 4, issued August 5, 1971 in El Paso Natural Gas Company, Docket RP 72-6. Sec. 11.3 Curtailment Procedures, El Paso Natural Gas Co., FPC Gas Tariff, issued July 2, 1971.

27 Opinion 606, FPC Pet. 70a; *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, F.2d (CA 5), January 14, 1972, I.d. at 7a.

28 See Discussion, *infra* at p. 56.

vide as great a profit as that pipeline can earn by diverting the gas volumes from those customers who purchased under low price, long term contracts to reslae customers who must pay substantially higher and continuously escalating prices under rates fixed by the FPC.

No provision of the Act grants the FPC any authority to override and supersede all existing contracts between a pipeline and its direct sale and resale customers, as well as the certificate obligations of such pipelines. The term "curtailments" is alien to the Act, as is the concept of "plenary jurisdiction" over the gas delivery obligations of pipelines. The FPC is seeking to improve the Act, from its standpoint, by inducing this Court to accept a strained and tenuous interpretation of statutory provisions which deliberately denied it any authority over the prices and terms of direct sale service and only limited authority of the type sought to be exercised over resale service.

Sections 4 and 5 of the Act authorize the regulation of *service* and well as of *rates*. The prohibitions of Section 4(b) against the action of a natural gas company in according any undue preference or advantage to one resale customer over another or in maintaining any unreasonable difference as between localities or classes of service has been held applicable to the allocation of inadequate mainline transmission capacity, of an interstate pipeline, among its resale customers (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.22d 784, 789 (CA 6); *Michigan Consolidated Gas Co.* v. *FPC*, 203 F.2d 895, 901 (CA 3); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.2d 675, 679 (CA 3)). But, the FPC can only invoke its authority under these sections upon a finding that the pipeline's service priorities are unduly preferential or discriminatory since its authority to regulate service is based upon the implementation of the statutory objective of

remedying such unlawful practices (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, cited *supra*, at 789).

The FPC itself has recognized these limitations upon its powers to control and limit gas delivery volumes in the only case in which it has ever exercised such authority; *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196, 197, 203, 204, and a series of related cases all involving the same parties and a single interstate pipeline. These cases are distinguishable in several vital respects. They related to a shortage of pipeline transmission capacity rather than to a gas supply shortage. The reduced gas volume allocations were made effective by FPC orders only with respect to Panhandle's resale customers, gas distributors and other interstate pipelines. Panhandle's contracts with these jurisdictional resale customers were filed with the FPC as rate schedules under Section 4(c) of the Act but did not contain "any provisions respecting curtailment of firm service when demands on the pipeline system exceed its delivery capacity." (at 202) No party ever challenged in court the validity of the Emergency Service Rules and Regulations prescribed by the FPC which were of limited duration. The rights of firm direct sale customers were neither at issue nor affected in such cases. None of these circumstances are present here.

An analysis of the structure of Sections 4 and 5 clearly reveals that the FPC's rate and service powers can be exercised only with respect to gas delivered by an interstate pipeline to a resale customer. Each of the operative paragraphs of Section 4 and of Section 5 repeats the express limitation of the powers thereby granted to the "transportation or sale of natural gas subject to the jurisdiction of the Commission" for the purpose of excluding therefrom the matters expressly exempted from the coverage of the Act by Section 1(b). These include sales not for

resale, i.e., any direct sale of gas to be consumed by the purchaser. To read the word "transportation" in this limiting clause as conferring upon the FPC under Sections 4 and 5, the very powers over the prices and terms of direct sales excluded by Section 1(b) and again excluded by the incorporation of such limited clauses in each of such sections would nullify and subvert the clear intention of Congress (*FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 499, 503, 508). Yet the FPC and United request such a construction by this Court.

Section 4(a) requires all *resale* rates and charges, and rules and regulations affecting them, to be just and reasonable. Section 4(b) prohibits any natural gas company, with respect to any *resale* rate or service, from subjecting any person to any undue prejudice or disadvantage and from maintaining any unreasonable difference in rates, service, facilities or in any other respect between localities or classes of such service. Section 4(c) requires the filing, in the form of tariffs, of schedules embodying all *resale* rates, classifications, practices and regulations affecting such rates, together with all contracts affecting such matters. Section 4(d) requires the filing, on thirty days notice, of tariffs proposing changes in such *resale* rates and services. Section 4(e) provides for hearings, upon complaint or on the FPC's own initiative, concerning the lawfulness of such *resale* rates, classifications or service. Section 5(a) authorizes the FPC when it finds that any *resale* rate of classification, or any regulation, practice or contract affecting such rate or classification is unjust, unreasonable, unduly discriminatory or preferential to prescribe the lawful rate or service to be thereafter effective.

These considerations based upon the plain text of the Act establish that the limited powers of the FPC to regulate service for the purpose of preventing discrimination or preference can only be exercised with respect to gas sold

for resale. The Court of Appeals for the Seventh Circuit reached the same conclusion in *Fuels Research Council, Inc.* v. *FPC*, 374 F.2d 842, 852-853. That decision construed the term "persons" in Section 4(b)(1) and the powers of the FPC to change unduly discriminatory or perferential rate designs under Section 5(a) to be limited in scope to resale rates affecting gas distributors and the ultimate consumers purchasing from them.

D. THE FPC HAS NO STATUTORY POWER OVER DISCRIMINATION IN SERVICE BETWEEN DIRECT AND RESALE CUSTOMERS

The FPC's only authority to prevent undue and unlawful discrimination or preference derives from Sections 4 and 5 of the Act. The FPC[29] and United[30] contend that if direct sale customers obtain gas for industrial purposes, while resale customers requiring gas for ultimate consumption by domestic end-users are curtailed, there will be an undue preference to the former class of service. They argue from this premise that the Court of Appeals holding that the FPC lacks curtailment jurisdiction over direct sales in inconsistent with, and undermines, the agency's jurisdiction under Sections 4 and 5. This argument erroneously assumes that the rate, service and tariff provisions of the Act are designed for the mutual and reciprocal protection of direct sale and resale customers. It further erroneously assumes that the FPC has been invested by Congress with authority to control and regulate, in rate proceedings, the end-use of gas by different classes of ultimate consumers.

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[29] Pet. 18-19.

[30] I.B. at 15.

As already established, Sections 4 and 5 encompass only the protection and regulation by the FPC of resale customers. Furthermore, the FPC lacks statutory authority to consider the end-use of gas or conservation factors in proceedings under Sections 4 and 5 (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 608-614; *Fuels Research Council, Inc.* v. *FPC*, 374 F.2d 842, 853-854 (CA 7); *City of Detroit* v. *FPC*, 230 F.2d 810, 816-817 (CADC)). The claim of discrimination against resale customers is based solely on the unfounded assumption that the FPC is authorized to establish service priorities, regulating different classes of end-use by ultimate consumers, in the exercise of its rate and tariff jurisdiction. Thus, the alleged discrimination is wholly beyond the statutory powers of this agency.

The FPC[31] and United rely upon a *dictum* in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 647, to support the thesis that direct sales contracts are within the scope of its Section 5(a) powers to prevent discrimination and preference. But, *Panhandle* did not present any issue as to the agency's powers to nullify or vary either the price or terms of such contracts. It decided only that the FPC did not abuse its administrative discretion by allocating excess earnings or the combined jurisdictional and nonjurisdictional business of an interstate pipeline to its regulated resale business. This Court noted that Panhandle earned more than a 200 percent profit on its industrial sales and held:

> "It is a fairly obvious indication that the regulated business is being saddled with costs which in fairness should be borne by direct industrial sales. That is an extremely relevant consideration for the Commission to take into ac-

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[31] I.B., ftn. 19a at 22.

> count when it determines what costs are fairly attributable to each business and what the resultant rate for the wholesale business should be. *Section 5(a) does not of course give the Commission authority to disregard the jurisdictional lines which Congress has drawn between interstate wholesale sales and direct industrial sales so as to level the profits between the two classes of business.*'" (At 647). (Emphasis Added).

Clearly, the decision recognized that the FPC could not eliminate *price discrimination* between resale and direct sale customers. *A fortiori*, it cannot remedy *service discrimination* between these two classes of customers because Section 5(a) cannot possibly be construed as granting greater powers over practices or contracts *which do not*, than over those *which do, affect* a jurisdictional resale "rate, charge, or classification".[32] Allocation or assignment of the regulated portion of a pipeline's total business clearly and directly affects jurisdictional resale rates. Reduction of gas delivery obligations by allocations under curtailment plans have no such impact.

The FPC itself has recognized that it lacks necessary statutory authority to remedy undue preference and discrimination between different direct sale customers or between localities, caused by either unequal rate levels or

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[32] This Court's statement that direct sales contracts are within Section 5(a) specifically referred to the statutory language that "... whenever the Commission 'shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate.*'" (p. 647) (Emphasis original).

by curtailment practices concerning interruptible direct customers (*Coastal Transmission Corp.*, 26 FPC 318, 324-325).

E. THE FPC LACKS STATUTORY POWER TO REALLOCATE GAS SUPPLIES FROM DIRECT SALE CUSTOMERS TO RESALE CUSTOMERS

The FPC claims plenary jurisdiction, by virtue of its authority over the interstate transportation of natural gas, to reallocate gas supplies between direct sale and resale customers and also to control the end-use of natural gas by ultimate consumers. As already demonstrated, such powers cannot be derived from Sections 4 and 5. They are not expressly conferred by any section of the Act and could only be implied under the certificate provisions of the Act, Section 7. That section authorizes, by issuance of a certificate of public convenience and necessity, the regulation of any transportation or natural gas in interstate commerce utilizing the facilities of a pipeline. It provides the statutory vehicle for authorizing the dedication of a natural gas supply to interstate movement and the installation of any new or improved facilities used to transport such gas, either on a transportation service for hire basis or on a sale for resale basis.

In determining whether the public convenience and necessity requires the issuance of a certificate, the FPC must consider all aspects of the proposed use of interstate transportation facilities in order to decide whether the granting of the requested authorization will impair the pipeline's ability to continue adequate service to its existing customers, including those purchasing under direct sale contracts. When the proposed use of facilities, and the service to be rendered thereby, involve a direct sale to industrial consumers the FPC may initially certificate facilities used for the "transportation" of gas although the "sale" of such

gas is beyond its regulatory powers (*FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1; *Panhandle Eastern Pipe Line Co.* v. *FPC*, 359 F.2d 675, 682 (CA 8); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F.2d 467 (CA 3), cert. denied, 352 U.S. 891; *Coastal Transmission Corp.*, 26 FPC 318, 324).

Such certificate jurisdiction does not involve any regulation of the price or other terms of a direct sale or represent an assertion of jurisdiction over the purchaser. In the framework of initial certification, transportation and sale are separate subjects of regulation. But, this indirect and limited jurisdiction does not detract from the force and scope of the complete exclusion of direct sales from the regulatory powers of the FPC in other situations and under other sections of the Act, such as Sections 4 and 5. As this Court held, in *Transcontinental*, cited *supra* at 4, a direct sale "*. . . is not subject to the Commission's jurisdiction except insofar as Section 7 requires the Commission to certificate the transportation of gas pursuant to the sale.*" (Emphasis Added).

In any event, the FPC's powers under Section 7 are limited in nature and fall far short of the complete allocation power it claims to divert gas supplies from direct sale industrial use to resale domestic and commercial use. *Transcontinental*, cited *supra* at 17, decided that ". . . the Commission's powers under Section 7 are, by definition, limited . . ."; it ". . . cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification". That case further held that the FPC was not empowered to allocate gas to specific end-uses stating: ". . . it is clear that the Commission fully realized the distinction between the [limited] power it enjoys under Section 7 and complete allocation power" (at 18-19).

In arriving at this conclusion, careful consideration was siven to an abortive attempt to amend the Act by declaring a national policy that the public interest required the promotion of national defense and conservation of gas reserves for those uses affording the highest social benefits to the public (H.R. 982, 1949). The FPC had opposed this bill because much of the gas sold for industrial uses was consumed within producing states and could not be subjected to its regulatory control. This Court also recognized that the Act deliberately and meticulously invested the FPC with only limited authority short of the reach of federal constitutional power over interstate commerce, and left the residue including regulation of direct sales to the states, citing *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507 (*Transcontinental, cited supra,* at 8).

In the light of these considerations, this Court concluded that the FPC lacked power to prohibit by a uniform rule direct sales for use as boiler fuel (365 U.S. 16-17). However, although the FPC cannot directly control and regulate end-use in a Section 7 proceeding, it can consider proposed uses of gas sold under direct sale contracts as one relevant factor, among all other such factors, in determining whether to certificate a proposed sale.

Applying the same rationale it also concluded that Section 1(b) prohibits any effort ". . . to bar direct sales absolutely, thus forcing all gas transactions into regulated [resale] channels" although the FPC could give such limited consideration and weight to the impact of a proposed direct sale price on prices payable by resale customers (365 U.S. 23-24).

To summarize, Congress left the regulatory authority of the states intact and undiminished with respect to all aspects of direct sales made by interstate pipelines except for the initial certification of such sales by the FPC; de-

clined to incorporate in the Act a national policy preferring certain end-uses of this limited natural resource; denied the FPC power to allocate either the national supply or the interstate supply of natural gas to different classes of end-use by ultimate consumers and prohibited any effort by the FPC to channel gas supplies to resale customers of interstate pipelines by barring sales to direct industrial consumers.

In *Granite City Steel Co.*, v. *FPC*, 320 F.2d 711, 713 (C.A.D.C.) an attempt by the FPC to reallocate mainline transmission capacity of an interstate pipeline in excess of its delivery commitments to firm customers from direct sale industrial users to resale customers was held unlawful under Section 7(a) because it would impair the pipeline's ability to render adequate service ot its existing customers. The rationale of the decision rejected the FPC's claim that it could control the end use of gas and give priority to domestic and commercial users[33] on the basis that:

> *"The theory and purpose of the statutory restriction of 7(a) appear to be that persons desiring gas for the first time, or desiring more gas, should not get it by taking it away from existing lawful customers. We think Mississippi's service to its industrial customers will not be "adequate" within the meaning of Section 7(a) unless it meets their present and reasonably foreseeable requirements approximately as well as the service Mississippi has been furnishing them.* This is no less true because Mississippi has contracted

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[33] In *Arkansas-Louisiana Gas Co. et al.*, 27 FPC 697, 703, the agency found, under Section 7(a), that it was in the public interest for the pipeline to supply additional capacity to its resale customers and also found under Sectional 5(a) that its "practice or contract" respecting allocation of capacity to direct industrial customers was "unduly discriminatory or preferential" against resale customers.

to supply the full requirements of many utility customers while its contracts with industrial customers contain no full-requirements clause and are subject to cancellation on six months notice," (at 713) (Emphasis added).

Clearly, the FPC cannot *permanently* reallocate gas volumes from direct sale to resale customers by prohibiting industrial end-use of such gas. Since it lacks special emergency power to deal with a gas shortage, it is acting outside the scope of its statutory authority in taking such action to relieve United of its delivery obligations for an alleged *temporary* period.

F. SECTION 1(b) DOES NOT GRANT ANY SUBSTANTIVE POWER AND CANNOT BE COMBINED WITH SECTIONS 4, 5 AND 16 TO CREATE IMPLIED POWER TO REALLOCATE GAS SUPPLIES

The FPC claims power to reallocate gas supply volumes from direct sale to resale customers on the novel and unprecedented theory that it has *concurrent* and *coextensive* jurisdiction over interstate *transportation* and *sales for resale* under Section 1(b). This reading of the Act is designed to evade the prohibition in the very same section against regulation of any aspect of the prices and terms of direct sales. It is the keystone of the FPC's attempt to nullify and supersede the impairment of delivery terms of direct sale contracts without invoking its rate, service and tariff powers which are admittedly limited to sales for resale. This is an argument that the FPC can achieve indirectly what Congress has prohibited it to do directly.[34]

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[34] The agency recognized this limitation on its jurisdiction in the context of construction of its powers under the unusually broad standard of "public convenience and necessity" in *Panhandle Eastern Pipe Line Co.*, 15 FPC 46, 57-59, aff'd. *Central West Utility Co. v. FPC*, 247 F.2d 306, 312 (CA 3).

Section 1(b) is not a grant of any substantive power. Rather, it is a mere definition of the scope of the regulatory powers conferred by the Act which is cast in terms of the types of transportation and sale transactions Congress committed to federal regulation and reserved to state regulation. Direct sales for consumptive use were deliberately and unmistakably exempted from the authority granted the FPC in each and every section of the Act (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 334-336). Section 1(b) is not self-executing. Each of the substantive sections of the Act empowers the FPC to regulate a different subject and the individual powers, thereby conferred must be exercised in accordance with the specific procedures prescribed by Congress.

Furthermore, in implementing its powers under any section of the Act, the FPC cannot claim implied power which was expressly withheld in another section of the Act. Thus, in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.2d 675, 679-680 (CA 3), an attempt, under Sections 4(b) and 5(a), to eliminate unduly disrciminatory and preferential practices in a pipeline's allocation of its transmission mainline delivery capacity to different resale customers by ordering a compulsory enlargement of such facilities in disregard of the prohibition against such action, in Section 7(a), was held unlawful.[35] The FPC's claim that Section 1(b) grants powers which can be implemented under the tariff revision procedures prescribed in 4(d) and 4(e) for

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[35] Furthermore, the FPC may not rely on Section 4(b) to override this prohibition of Section 7(a) even when exercising its certificate powers (*Panhandle Eastern Pipe Line Co. v. FPC*, 247 F.2d 306, 310-313 (CA 3).

changing resale rates, practices and contracts although the latter sections may not be applied to direct sales clearly runs afoul of this legal doctrine. This Court has specifically condemned an attempt by the FPC to combine different sections of the Act by the purpose of circumventing explicit limitations imposed by Congress.

In a completely parallel situation presented in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 499, 504, 507-508, the agency claimed jurisdiction over a transfer of undeveloped gas reserves owned by an interstate pipeline to its production affiliate which sold the gas in intrastate commerce. The FPC was unable to base its claim of statutory authority on any express provision of the Act and was confronted with a specific exemption in Section 1(b), concerning production or gathering. It sought a narrow interpretation of that exemption and combined several separate sections of the Act to lay the foundation for implied authority necessary to protect granted statutory functions and objectives. It claimed authority under Section 1(b) broad enough to neutralize the specific exemption and also invoked Section 16 to counterbalance that prohibition. Finally, it justified the requested broad construction on the need to avoid a gap impairing the comprehensive regulatory scheme established by the Act. In all of these respects, the arguments presented to this Court were the same as those pressed here. This Court completely and squarely rejected each of these arguments, for reasons which are equally compelling and controlling in this case:

> "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act. In support of this position it is pointed out that the

section spefically exempts both the local distribution and the facilities used therefor while it makes no mention of the facilities used for production or gathering. *In the face of the unambiguous language of the Act and its legislative background, we cannot ascribe such a narrow meaning to the words, 'the production or gathering of natural gas.'* . . .

The Commission urges it has jurisdiction over the transaction between Panhandle and Hugoton from the powers granted to it by Section 7(c) of the Act, 15 USCA Section 717 f (c), 4 FCA title 15, Section 717 F (c), which authorizes it to issue certificates of convenience and necessity for the interstate trnasportation and sale of natural gas and those granted to it by Sections 4 and 5, 15 USCA Sections 717c, and 717d, 4 FCA title 15, Sections 717c and 717d, to determine reasonable rates for such transportation and sale. It is pointed out that Panhandle in three applications for certificates of convenience and necessity to construct additional pipe-line facilities had included the acreage here involved as part of its gas reserves, and certificates were issued upon the finding by the Commission that Panhandle had adequate reserves to warrant its expansion. Moreover Panhandle had been permitted to include these reserves in its rate base as 'used and useful property.' The Commission, therefore, argues that these gas leaves which Panhandle proposes to grant to Hugoton have been dedicated to the discharge of Panhandle's public-utility obligation to render adequate service at reasonable and nondiscriminatory rates. *From these circumstances, the Commission concludes*

that these leases cannot be relinquished by Panhandle without the consent of the Commission, which has the implied power to protect its rate-making function and to insure the maintenance of adequate service by a natural-gas company. Sections 4, 5 and 7 [redacted] not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms. Thus Sections 4(a), (b), (c), 5(a) and 7(c) speak of 'transportation or sale of natural gas subject to the jurisdiction of the Commission' while Section 7(a) and (b) refer respectively to 'transportation facilities' and 'facilities subject to the jurisdiction of the Commission.' *Nothing in the sections indicate that the power given to the Commission over natural gas companies by Section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power the Commission to the constitutional limit of congressional authority over commerce. The repetition of the words 'subject ot the jurisdiction' makes clear to us the intent to keep the Commission's hands out of the excepted local matters. The same answer applies to petitioner's argument that Section 16, 15 USCA Section 717o, 4 FCA title 15, Section 717o, gives it authority to stop sales of leases. The power to do the things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions. . . .*

To accept these arguments springing from power to allow interstate service, fix rates, and control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of

the forbidden area.[14] It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress . . . .

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[14] Would it soon be contended that statutory power to require extension of service, Section 7(a), included power to require exploration or acquisition of leases or *allocation of production to interstate pipe lines* in order to serve the public interest?

Note:
Other footnotes omitted and Emphasis Added.

There is no merit to the FPC's claim that Section 16 authorizes it to utilize the procedures prescribed in the rate sections to implement transportation authority granted, if al all, only by Section 7. Nor can that section be used to enlarge authority withheld by the Act since its sole function is to implement powers specifically granted (*Murphy Oil Corp.* v. *FPC*, 431 F.2d 805 (CA 8); *Willmut Gas & Oil Co.* v. *FPC*, 294 F.2d 245, 249-250 (CADC); *Niagra Mohawk Power Corp.* v. *FPC*, 379 F.2d 153, 158 (CADC)). Finally, as this Court held in *Panhandle*, Section 16 can never be utilized to circumvent and evade an express prohibition against the exercise of jurisdiction, in this case, regulation of the terms of direct sale contracts.

G. THE FPC DOES NOT HAVE COEXTENSIVE AND CONCURRENT POWER OVER TRANSPORTATION AND SALE UNDER THE CERTIFICATE AND RATE SECTIONS OF THE ACT

Section 7 is the only provision in the the Act which authorizes the regulation of the transportation facilities of a

natural gas company or of the service thereby rendered.[36] It is both complete and comprehensive and expressly grants authority to control and supervise extensions or improvements of such facilities; their abandonment; the issuance and terms and conditions of certificates and the acquisition of pipeline right-of-ways by eminent domain proceedings. The FPC's claim that Congress intended the mere definitions in Section 1(b) to override and supersede these specific provisions granting its only express powers to regulate the interstate transportation of natural gas defies credibility.

The FPC[37] construe the incorporation, in Sections 4 and 5 of the Act, of the limitations upon its jurisdiction set forth in Section 1(b) as evidence of an intention to authorize the exercise of "transportation" authority under these rate and tariff provisions. To read the word "transportation" in this limiting clause as conferring upon the FPC under those sections the very power to regulate the prices and terms of direct sales deliberately excluded by Section 1(b) and again excluded by the express recital that the powers of the FPC under Section 4 and 5 are limited to "... the transportation or sale of natural gas subject to the jurisdiction of the Commission..." would nullify and subvert the clear and plainly expressed intent of Congress. *In the context of rate and tariff regulation, the FPC's powers are restricted to the regulation of rates and the elimination of preferences and discrimination in connection with the*

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[36] Neither the FPC nor United can invoke such certificate authority in the absence of an application under Section 7(b) or 7(c), the statutory hearings required as a prerequisite to the exercise of such authority and express findings that the granting of a certificate will serve the public convenience and necessity. (*United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 91).

[37] I.B. at 34.

interstate transportation of gas owned by others and the interstate sale of gas for resale.

Furthermore, the FPC's assertion of coextensive and concurrent jurisdiction over the transportation and sale of natural gas under the certificate and rate sections of the Act ignores both the interplay between those sections and the structure of the Act. Section 7 is the statutory vehicle for initially dedicating natural gas supplies to interstate movement and for initially authorizing the use of pipeline facilities for the interstate transportation or sale of such gas supplies. The powers granted to the FPC in Sections 4 and 5 only become operative after such initial certification of natural gas in interstate commerce by means of a permanent certificate. Before the issuance of such a certificate, the FPC can regulate rates by attaching appropriate conditions under Section 7(e). Thereafter, it can correct an excessive or discriminatory rate only by proceedings under Section 4, initiated by company rate filings, or under Section 5, initiated by its action in instituting a rate investigation. *(376 U.S. 515, 519-524). Consequently, the FPC can exercise its statutory authority over the transportation of natural gas in interstate commerce only under the certificate section of the Act and cannot claim such authority under the rate and tariff sections of the Act.* These legal considerations fully and plainly negate its claim that it may reallocate gas supply volumes from direct sale to resale customers by virtue of its "transportation" authority under Sections 4 and 5.

The FPC's contention that it has coextensive and concurrent jurisdiction over transportation and sales for resale under the certificate and rate sections of the Act was specifically rejected in *United Gas Pipe Line Co. v. FPC*, 388 F.2d 385, 388 (CA 5). In that case, the issue was the proper application of the agency's formula for allocating consolidated tax return savings between affiliated regulated

and unregulated companies joining in a single return. Its formula involved three distinct steps: separation of the companies into regulated and unregulated groups; determination of the net aggregate taxable income of each group and apportionment of the total consolidated tax between the two groups, and among companies in the regulated group, on the basis of their respective taxable incomes. The FPC classified the pipeline as a completely regulated company although 45% of its income was derived from jurisdictional sales for resale, 10% from nonjurisdictional sales for resale regulated by state commissions and 45% from nonjurisdictional direct sales not regulated by any agency. The FPC justified its classification of such direct sales as regulated business activities on the ground that they were "... subject to the Commission's *certificate jurisdiction with respect to transportation*." (Emphasis Added). The Court of Appeals flatly repudiated this theory because:

> The Commission's certificate jurisdiction is not the same as its rate jurisdiction and the Commission's judgment in this respect is invalid since this is a rate case which we are considering and regulation here is *rate* regulation. (Emphasis Original).

The State submits that these considerations conclusively establish that the FPC does not have coextensive and continuing jurisdiction over the interstate transportation and sale of gas under the certificate and rate sections of the Act.

Assuming, for the sale of argument, that it had such jurisdiction the claimed power to reallocate gas supply volumes could only be exercised if such transportation authority is of a *continuing nature*. Stated otherwise, if such transportation authority is exhausted and terminated

by the issuance of a permanent certificate authorizing the use of interstate pipeline facilities to transport gas to direct sale customers, the FPC clearly lacks any statutory authority ". . . to regulate the *volumes* of gas transported for direct sale."[38] This was the rationale of Opinion No. 606 and the heart of its claim that curtailments do not relate to *rates* but to *transportation.* The FPC's arguments to the Court of Appeals in this case were based principally on this continuing transportation jurisdiction theory. In its arguments to this Court, the FPC has completely abandoned its reliance on Section 7 of the Act and seeks to conceal and deemphasize the total dependence of its alleged plenary jurisdiction over pipeline curtailment plans on such continuing transportation jurisdiction. The State submits that this reversal of position is caused by the FPC's belated realization that its certificate powers end upon the issuance of a permanent certificate which, as already established, do not permit reallocation of gas supplies.

The Natural Gas Act does not expressly confer upon the FPC the authority to change an issued and effective certificate of public convenience and necessity. The absence of such an express provision gains significance from the explicit delegation by Congress to the Civil Aeronautics Board of power to "alter, amend, modify or suspend any such certificate, in whole or in part, if the public convenience and necessity so require. . ."[39] It is hornbook law that an administrative agency cannot alter or amend a previously issued permanent certificate in order to implement a changed regulatory policy unless its enabling act specifically provides for modification or revocation of such certificates (*United States v. Seatrain Lines,* 329 U.S. 424, 428-432; *American Trucking Association v. Frisco Co.,* 358 U.S. 133,

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[38] Sol. Gen. Pet. at 57a.

[39] 49 U.S.C.A., Sec. 1371.

146; *Watson Bros. Transportation Co. v. United States*, 132 F. Supp. 905 (D.C. Neb.) aff'd 350 U.S. 927). The FPC's reallocation of gas supplies is such a change in policy.

Nor may an agency condition a certificate by reserving the power to attach such terms, conditions and limitations as it may later deem appropriate in order to deprive the licensee of previously granted substantive rights (*United States v. Seatrain Lines, Inc.*, 329 U.S. 424; *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 321). Section 16 which grants the FPC power to "rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act: does not include "certificates" (*United States v. Seatrain Lines, Inc.*, cited *supra*, at 432). The FPC is unable to cite a single instance in which it has either vacated or modified a permanent and unconditioned certificate which has become effective. On the contrary, it has conceded the applicability of the Seatrain Lines doctrine where the natural gas company has relied upon the issuance of a permanent certificate (*Turnbull & Zoch Drilling Co., Operator*, 26 FPC 678, 680).

The FPC[40] and United[41] rely upon a mere *dictum*, taken out of context and incorrectly construed, in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, cited *supra* at 523. This is the sole support for their clearly erroneous view that the statutory grant of authority over "transportation" authorizes the reallocation of direct sale gas supply volumes to resale customers. Fundamental questions of jurisdiction must be based on an informed and sound interpretation of the agency's enabling Act rather than on isolated fragments of superfluous language in an opinion. As this Court stated in *United Gas*

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[40] I.B. at 24.

[41] I.B. at 9-10.

Improvement Co. v. Continental Oil Co., 381 U.S. 392, 404:

> "Concepts of stare decisis in statutory interpretation apply to the *holdings* with which the case-by-case method of decision surrounds a statute. To recognize no differences between the Panhandle transfers and those in issue here, and in the name of stare decisis to hold that Commission jurisdiction depends on the form rather than the substance of the transaction, would turn the case-by-case process against itself." (Emphasis Original).

Panhandle did not involve any reallocation of gas, or any interruption of service, to either direct or resale customers, rather it presented for decision only the issue of whether a state commission had power to require an interstate pipeline to make direct sales, in competition with local gas distributors. This Court sustained such state power holding that Congress had not preempted the entire field of regulation of direct sales made in interstate commerce; had reserved to the states their preexisting powers to regulate both the *rate* and *service* aspects of such sales and that uniform national regulation was not required either by the Act or by the Constitution.

The dictum quoted by petitioners was a response to the contention of Panhandle, in its brief,[42] that since the Supreme Court of Indiana had held the pipeline obligated to serve all applicants, and other states would also impose such a public utility obligation, there would be conflicts between the several states and between the states and the FPC resulting from diverse administrative orders imposing service obligations beyond the physical capacity of the

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42 Appellant's Brief at 49-50, Appendix O, 22a-23a.

pipeline to meet. Panhandle relied upon the provisions of the Act giving the FPC jurisdiction over the construction of new facilities for the interstate transportation of natural gas and its policy of refusing certification of sales to new customers without regard to any need for additional facilities when such authorization would impair the pipeline's ability to render satisfactory service to existing customers. It was in the context of this purely hypothetical situation, which had not then and still has not materialized, that this Court stated that: "... if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." (Footnote Omitted).

H. THE FPC HAS NO STATUTORY POWER TO CHANGE THE IMPAIRMENT OF DELIVERY TERMS OF DIRECT SALE OR RESALE CONTRACTS BY TARIFF REVISION PROCEDURES

United filed with the FPC tariff provisions, applicable for the first time to its direct sale customers and to its resale customers served by the separate intrastate pipeline systems in Southern Louisiana regulated by the LPSC and in derogation of their contract rights, which the agency made effective without any statutory findings that the existing contract terms were unduly preferential or discriminatory or that the revised terms were fair and lawful. The FPC urges that because there is an emergency caused by a gas supply shortage it is essential that it utilize the tariff revision procedures of Section 4(e) of the Act. As already established, the FPC has no special emergency authority to deal with such istuations; has not made any findings supported by evidence, substantial or otherwise, that there is an emergency and cannot order a pipeline to file tariffs applicable to direct sale contracts.

Furthermore, the FPC cannot utilize the tariff revision procedures of Section 4 to change either the rates or terms of service rendered to even interstate resale customers subject to its jurisdiction, unless they have consented to such unilateral changes by pipeline suppliers in their contract rights. The basic powers of the FPC over resale rates and service are defined by, and can only be exercised in accordance with, the specific procedures prescribed in Section 5(a) of the Act. That Section authorizes the agency to set aside and modify any new or existing resale rate, practice or contract which it finds to be "unjust, unreasonable, unduly discriminatory or preferential" on the basis of record evidence, after full hearings, and such powers may only be exercised prospectively (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 333, 341-343; *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353). Section 4(e) adds to this basic power, in the case of a newly filed rate or a change in a previously filed rate proposed by a natural gas company, the further powers to preserve the status quo pending review of the new or changed rate by suspension for a limited period and, after final determination of its lawfulness, to make its order retroactive to the date when the suspended rate became effective by means of refunds (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, cited *supra*, at 341-342; *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 113-114).

However, Section 4 does not supersede either the rates or any other terms of a contract between an interstate pipeline supplier and its distributor or pipeline resale customers. Unlike the Interstate Commerce Act which requires uniform rates and practices, the Natural Gas Act preserves and sanctions invididual private contracts. Natural gas companies retain the right "to establish ex parte, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the

rate agreed upon with a particular customer" (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, cited *supra* at 343). Thus, the Act does not empower an interstate pipeline to unilaterally change its contracts and the tariff revision procedures of Sections 4(d) and 4(e) can be utilized only where the customers have consented to such changes (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, cited *supra* at 342-344; *United Gas Pipeline Co. v. Memphis Light, Gas, and Water Division*, cited *supra* at 112-113).

United's Louisiana direct sale and resale customers have withheld such consent, except for a few who have recently signed so-called "tariff and service agreements" under duress. The FPC seeks to evade the rule of *Mobile* on the strained and tenuous theory that although a pipeline cannot unilaterally change the terms of its contracts governing service priorities in the event of a gas shortage, the agency may order such companies to formulate curtailment plans reallocating their gas supplies from direct sale to resale customers and to file such plans as tariffs.[43] This is a brazen and transparent attempt to circumvent the express requirement of Section 5(a)[44] that as a condition precedent to the exercise of its power to prescribe any rate, practice or contract the agency must find the existing tariff provision unlawful. The FPC has not found that the impairment of deliveries provisions in effect before United's tariff revisions discriminatory or preferential. Such a finding would appear to be precluded by the fact that United's direct sales contracts and Section 12.1 of its preexisting FPC

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[43] I.B. at 31-32.

[44] Applicable also to Section 4 proceedings under the Section 4(e) proviso that the FPC may make such orders in proceedings initiated by company tariff filings as would be proper in an investigation of an existing rate.

Gas Tariff are substantially identical.[45] Finally, the FPC does not have plenary or unlimited powers to substitute its judgment of what constitutes a lawful rate, practice or contract for that of the parties to such contracts. Thus, even when it is properly proceeding under Section 5(a) to modify an existing contract it cannot relieve a pipeline of an obligation to provide service at a rate which is less than the just and reasonable rate unless "the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers as excessive burden, or be unduly discriminatory" (*FPC v. Sierra Pacific Power Co.*, cited *supra*, at 355).[46] This is because the powers of the agency to regulate rates are for the protection of the public interest, as opposed to the private interests of the utilities.

I. FPC JURISDICTION TO REALLOCATE DIRECT SALE GAS SUPPLIES TO RESALE CUSTOMERS IS NOT NECESSARY TO AVOID A REGULATORY GAP

Petitioners claim[47] that, unless the FPC has power to override the terms of direct sale contracts dealing with impairment of deliveries during periods of gas shortage, it will be impossible to establish a uniform and rational system of service priorities and that there will be an "attractive gap" in

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[45] See Appendix p. 24a-26a.

[46] *Sierra* held the rate and tariff provisions of the Natural Gas Act and of the Federal Power Act equivalent and identical.

[47] FPC, I.B. at 17-21, 24-26; United, I.B. 10-13.

the regulatory scheme. The FPC has adopted an individual pipeline company systemwide approach as the appropriate unit for gas reallocation purposes. United's direct sale contracts and resale tariffs have impairment of delivery terms which are substantially identical and uniform, and also wholly free of any undue or unlawful prejudice or preference between direct sale and resale customers. Even if this were not the case, the FPC has no statutory authority to equalize the terms of service rendered to direct and resale customers.

Congress committed to the exclusive regulatory control of the states the rate, licensing and service aspects of direct sales made by use of the interstate facilities of a jurisdictional pipeline (*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 512, 513-514, 516-519; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 333-337). The Act withheld from the FPC power to remedy undue discrimination or preference between such state regulated direct industrial consumers and federally regulated resale distributors and pipelines, and the industrial consumers they serve, because the granting of such power would have invaded the constitutional prerogatives of the states to regulate such commerce which have not been limited by the Act. Thus, the FPC's regulation of direct sales violates the Act and invades powers reserved to the States under the Tenth Amendment to the United States Constitution.

The Act does not occupy the entire field within the reach of federal constitutional power and limited federal regulation only to the "gap area" where the Supreme Court had held the states constitutionally unable to act by fixing the import prices of out-of-state gas sold for resale, in many cases, by an interstate pipeline to an affiliated distributor company (*Interstate United Gas Co. v. FPC*, 331 U.S. 681, 682, 689; *FPC v. Hope National Gas*, 320 U.S. 591, 609; *FPC v. East Ohio Gas*, 338 U.S. 464, 470, 472-473).

The Natural Gas Act is an "in interstate commerce" act, not one "affecting" interstate commerce. Congress was well aware of the difference and had used broader language in statutes passed before or contemporaneously with the Natural Gas Act such as the Fair Labor Standards Act of 1938, 52 Stat. 1060, the Bituminous Coal Act of 1937, 50 Stat. 72 and the National Labor Relations Act, 49 Stat. 449. This restriction on FPC jurisdiction was designed to avoid a repetition of the unanticipated and unintended invasion of state jurisdiction in the transportation field under the *Shreveport* doctrine (*Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342, 355-360). A statutory prohibition against discrimination in interstate transportation by railroad unaccompanied by any express limitation upon its scope was there properly interpreted as empowering the Interstate Commerce Commission to regulate intrastate rates which affected interstate traffic by virtue of discriminatory or preferential features. The states were determined to avoid any repetition of such federal invasion of their regulatory prerogatives and the plain language of the Act, enacted at the request of the states acting in concert through the National Association of Railroad and Utility Commissions, witnesses this compact between the states and the federal government.

The State submits that the explicit language of the Act, which leaves no latitude for inference concerning Congressional intent; its clear legislative history; the consistent administrative interpretation of the Act by the FPC that it lacks power to change the price or terms of direct sale contracts and that agency's repeated and unsuccessful attempts to have the Act amended to grant such authority compel the conclusion that uniform federal regulation is neither appropriate nor lawful insofar as direct sales are concerned. This Court, in a case presenting parallel elements construed identical statutory language to preclude an exercise of jurisdiction over the use of unfair methods of competition in intrastate sales despite the fact that the prohibition of such business

practices by persons engaged in interstate commerce handicapped such competitors (*Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 350-355).[48]

Apart from these considerations, the FPC's individual pipeline company systemwide basis for rationing and reallocating gas deliveries creates, rather than corrects, undue and unlawful discrimination and preference between end-users of the same class in each state and in different states. It can insure, at most, only equal treatment to all customers of the same pipeline. It cannot afford equal treatment to end-users of the same class whether they are located in the same state or in different states. However, the State's suggested nationwide approach of allocating gas supplies to states, leaving to each state the responsibility for controlling the end-use of gas by its own citizens, would treat all states and localities fairly.

Many discriminatory and inequitable consequences flow from failure to allocate the total interstate supply of gas to the individual states of the federal union. A pipeline which has kept faith with its customers and not oversold its transmission capacity or gas reserves to maximize its profits will continue delivering full contract volumes, and on occasion increased volumes, to its direct industrial and power plant customers while other pipelines which have disregarded their contract and statutory obligations are substantially reducing deliveries to the same class of customers located in either the same state or in different states. The individual company approach has a disproportionate and oppressive adverse impact upon industrial and power plant consumers in the Gulf States where United has always been the dominant supplier of direct sales gas used for such purposes. United is

[48] The decision took cognizance of the fact that the *Shreveport* doctrine was in effect during the life of the Federal Trade Commission but that it never asserted similar authority.

totally unlike other pipelines. It not only supplies gas for resale by distributors and industrial gas in several states but acts as a gigantic gas gatherer collecting gas from the producing areas of the Southwest which it sells to, and transports for, five major interstate pipelines. This is its principal role. It is, in terms of volume, the world's largest transporter of natural gas and its system purchased, collected, and transported more than 1.8 trillion cubic feet in 1970. (Tr. 71-79, 120). Thus, consumers in producing states unfairly bear the brunt of a gas shortage reflecting increased demand in other states.

Moreover, the FPC is exceeding its statutory powers and invading prerogatives Congress deliberately left to the states when it seeks to control the end-use of gas by ultimate consumers. Each state is entitled to its own choice of service priorities and is not obliged to make them identical with those of other states. For, as the FPC itself recognized in Opinion No. 606: "Our jurisdiction over the disposition of natural gas ends when it reaches the hands of a nonjurisdictional person such as a distributor purchasing for resale. This language would in effect attempt to extend our jurisdiction over the disposition of gas by a local distributor, a matter within the province of the local regulatory body. *We will of course consider the past and planned disposition of volumes by the customers when ruling upon allocations for the various customers, but after allocating among United's customers, we leave for the states or other local bodies the job to oversee the distribution of that gas by the customers at the local level."*[49] *Thus, while admitting that it lacks jurisdiction to control end-use of natural gas by ultimate consumers, the FPC is unlawfully exercising such jurisdiction.* It is self-evident that the use made of gas by a direct industrial consumer is at least as much a matter of purely local concern as the disposition of resale gas by a distributor.

[49] Sol. Gen. Pet. at 71-a-72a. Emphasis added.

Contrary to the claims of United[50] and Brooklyn Union Gas Company,[51] Louisiana is not asserting that the citizens of a producing state are entitled to a priority in the use of their natural gas reserves during a period of shortage and taking action which prohibits exports of gas to other states of the type deemed to constitute a direct burden on interstate commerce in *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 584, 598. Rather, the State asserts only a right to a fair share of its natural gas reserves. Furthermore, the investigation instituted by the LPSC does not have as its purpose, as United suggests,[52] any attempt to rechannel interstate gas to industrial consumption within its borders. Rather, that investigation concerns only United's deliberate and persistent refusal to meet its obligations as an intrastate pipeline (Appendices R, S and T, at 40a, 44a, 47a). Nor is there any merit to United's contention[53] that the LPSC is constitutionally prohibited from regulating curtailment practices of intrastate gas pipelines. Article VI, Section 4, of the Louisiana Constitution provides that the "... power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered..." by such companies. This is an unusually broad delegation of power not found in the conventional state or federal public utility statute. Further, in a Special Order issued September 28, 1971 and in a General Order issued September 30, 1971, the Commission declared that it "has been vested with the authority and responsibility to regulate and

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[50] I.B. at 11.

[51] Brief, *Amicus Curiae* at 11.

[52] I.B. at 11.

[53] I.B. at 11-12.

control utilities with respect . . . to the *services* rendered by public utilities" and exercised such powers with respect to both United and other intrastate pipelines by instituting a comprehensive investigation. In any event, FPC "jurisdiction was not intended to vary from state to state depending upon the degree of state regulation." (*The Secretary of the Army, Atlantic Seaboard Corporation*, Order Denying Rehearing, Dkt. No. CP66-179, issued October 22, 1971).

Petitioners' suggestion that courts are not competent to deal with any disputes which may arise from the failure to an interstate pipeline to honor its clearly defined delivery obligations to direct sale customers is clearly without merit. This is an area in which the judiciary branch, not the FPC, has specialized expertise. Furthermore, the judicial process is subject to supervision by this Court and it has expressly rejected the argument that uniformity of regulation under the Act will be destroyed or impaired by permitting courts to enforce traditional common law contract rights (*Pan American Petroleum Corp. v. Superior Court of Delaware for New Castle County*, 366 U.S. 656, 665-666).

Finally, the concept of an "attractive gap" applies only in the absence of an express statutory prohibition against regulation of a specific subject as this Court held in rejecting the FPC's claim of implied authority in *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 499, discussed *infra* at 38.

II

THE COURT OF APPEALS JUDGEMENT THAT UNITED'S GREEN SYSTEM IS AN INTRASTATE PIPELINE WAS NOT AN ABUSE OF ITS JUDICIAL DISCRETION

The LPSC has always exercised exclusive and sole jurisdiction over the separate intrastate pipeline systems of

United in Southern Louisiana. Thus, the issue decided on the merits by the Court of Appeals was whether, by the self-serving and unlawful acts of United, this intrastate system has been converted to an interstate system to oust the LPSC of its lawful jurisdiction. This is not the normal situation of a dispute between a private party and a federal administrative agency concerning a matter within its established statutory powers to which the doctrine of exhaustion of administrative remedies applies. Rather, although arising in the context of a private lawsuit, this is a controversy concerning conflicting and mutually exclusive claims of jurisdiction between Louisiana and the Federal Power Commission.

On September 28, 1971, the LPSC instituted a comprehensive investigation of United's separate Southern Louisiana intrastate systems (the Green and Purple Systems).[54] United denied the jurisdiction of the state agency claiming that its unilateral action in applying to the FPC for certification of such systems invoked the supremacy clause of the United States Constitution to terminate the sole and exclusive jurisdiction the LPSC has continuously and lawfully exercised. It was, and still is, unable to cite any authority supporting this view. In Special Order No. 17-71, *Order Affirming Jurisdiction and to Show Cause,* (Appendix S, 44a-46a), the LPSC rejected this contention on the following grounds which United has never answered or appealed:

> "The doctrine of pre-emption is applicable only where Congress has enacted legislation designed to encompass all aspects of a particular field of regulation. But, Congress has not delegated to the FPC the full reach of its constitutional powers over interstate commerce. On the contrary, it authorized that agency to regulate only certain limited aspects of the transportation and sale for

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[54] Appendix R, 40a-43a.

resale in interstate commerce of natural gas. Congress gave the FPC no authority at all over intrastate commerce (*FPC v. Transcontinental Gas Corporation,* 365 U.S. 1, 17). Furthermore, Congress enacted Section 1 (c) of the Natural Gas Act in order to reserve regulation of intrastate pipelines and of local distribution systems entirely to state regulation. Plainly then, the FPC must defer to the states on matters which are primarily of local concern.

The supremacy clause is inapplicable unless and until a binding and final determination has been made that United's separate pipeline system in southern Louisiana is both in interstate commerce and outside the scope of the Hinshaw Amendment.

Such a determination cannot be made by the FPC. Only the courts can exercise the judicial function of determining the lawfulness of an assertion of jurisdiction by that agency in a particular proceeding. State regulation by this Commission will end therefor, if at all, only after the Federal Courts have made an adverse decision which is no longer subject to judicial review.

This Commission believes that during the pendency of such litigation it has both the authority and the duty to continue its regulation of United's rates and services. . . ."

Aside from these unique aspects involving a conflict of jurisdiction, the Court of Appeals did not abuse its judicial discretion even if the case is regarded as a conventional injunction proceeding. The FPC and United maintain that the Court of Appeals committed reversible error in rendering judgment on an issue admittedly within its jurisdiction

because of the mere pendency before the FPC of an administrative proceeding presenting the same legal question. Petitioners mistake the nature of the doctrine of exhaustion of administrative remedies. It is a guide to the exercise of discretionary judicial power to hear and determine controversies, not an absolute and inflexible barrier to court review. The cases cited by petitioners involve attempts by a private party challenging the jurisdiction of a federal administrative agency to enjoin or to otherwise terminate, by declaratory judgments, administrative proceedings concerned with the determination of so-called "jurisdictional facts" which will determine whether that party is subject to regulation. Here, neither LPL nor LPSC has sought to invoke the authority of the courts to stay or end the FPC's pending certificate proceedings. The judgment of the court below has not precluded the later issuance of FPC Opinion No. 610 which reached a contrary conclusion concerning the jurisdictional status of United's Green System. In fact, the FPC has remanded the case to an examiner for further hearings and the administrative process continues completely unimpeded and uninterrupted. Opinion No. 610-A issued on April 7, 1972 denied all petitions for rehearing and is now final. A timely petition for review has been filed by LPL in the Fifth Circuit. Court review of these jurisdictional issues will also proceed under the provisions of Section 19(b) of the Act aand, contrary to United's claim,[55] Congress has not prohibited resort by a private party to the general equity powers of the federal courts for *interim relief* pending a final resolution of issues of jurisdiction.

The vital distinction between cases where courts intervene in a controversy between a private litigant and the agency, by blocking or refusing to assist the administrative body in its task of investigating jurisdictional facts, and cases

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[55] I.B. 22-23.

where the agency's investigatory powers are unopposed was recognized and relied upon in *FPC v. Panhandle Eastern Pipe Line Co.*, 172 F.2d 57, 59-60, aff'd. 337 U.S. 499, 514-515. That case also rejected the primary argument made here that *the FPC is the sole competent judge of the scope of its own jurisdiction and that courts must defer to the pendency of its administrative proceedings until it can determine its own power and the necessity of its exercise.* While this ruling was made in the context of an FPC effort to obtain a court injunction during the pendency of its administrative proceeding, and this case presents the same issue in the context of the FPC's effort to prevent such an injunction, the rationale of the decision is equally applicable to both situations. *Panhandle* applied the long standing rule that where an agency is clearly acting in excess of its statutory authority, exhaustion of administrative remedies is unnecessary (*Leedom v. Kyne*, 358 U.S. 184; *City of Chicago v. Atchison, T & S.F. Railway Co.*, 357 U.S. 77; *Skinner & Eddy Corp. v. U. S., 249 U.S. 557, 562;* Deering Milliken, Inc. v. Johnson, 295 F.2d 856 (C.A. 4)).

The FPC, which was neither a defendant nor obliged to intervene in this private litigation between United and LPL, having participated as a party cannot complain that it was obliged to defend its jurisdiction and that the Court rendered a judgment on the merits adverse to its position. Petitioners' real complaint is not the *judgment* of the Court, which is not yet final, but rather its *opinion* which impedes their efforts to unlawfully oust the LPSC of its jurisdiction, convert an intrastate pipeline to an interstate pipeline and reallocate direct sale gas volumes from Louisiana customers to industrial consumers in other states served by this pipeline's resale customers who will be compelled to pay higher rates. Yet, the FPC and United have neither petitioned the Court of Appeals for rehearing *en banc* nor sought review on the merits by this Court.

A reading of Opinion No. 610 discloses the reason for this reluctance. The evidentiary records before the FPC and before the District Court both related to the same facts and year of actual gas flows and operations. In the light of the Fifth Circuit opinion, petitioners doubt their ability to prevail on the merits and wish to improve their prospects by resorting to facts not of record which result from United's deliberate rearrangement of its gas flows and operations, admittedly in violation of Section 7 of the Act, after it filed its October 1, 1970 application for a certificate. Opinion No. 610 unlawfully finds that United's motives in seeking to serve its own interests and evade state jurisdiction are immaterial and irrelevant. The FPC has officially noticed extra-record facts and unlawfully denied any opportunity to the parties to the proceeding[56] to controvert such facts by rebuttal evidence and cross-examination under Section 7(c) of the Administrative Procedure Act.

Petitioners seek to invoke the aid of this Court in their unlawful effort, unsupported by any precedent, to exercise certificate, curtailment and rate jurisdiction over United's intrastate Green System during the prolonged period rerequired to obtain a final resolution of this conflict of jurisdiction issue. If this Court does not vacate the judgment of the Fifth Circuit as to the Green System, the issue of whether the FPC is bound by that judgment will be litigated. If the LPSC prevails on this and related issues, the FPC will be unable to enforce the conditions of Opinion No. 610 that service to all of United's intrastate customers shall be continued only on an emergency basis and that they shall be subject to interim curtailment and rate increases and compelled to execute service agreements waiving their contract rights against unilateral changes by United. The State submits that these conditions are arbitrary, capricious, contrary to

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[56] The State and LPSC requested this opportunity in their Petition for Rehearing of Opinion No. 610.

law, beyond the statutory authority of the FPC and a deprivation of due process of law in violation of the Fifth Amendment to the United States Constitution. The FPC will also then be unable to enforce its direction that all of United's intrastate pipeline facilities and systems be operated as part of its integrated interstate pipeline system which is equally unlawful and unconstitutional and designed to aid United's efforts to evade state regulation. This is the relief sought in the LPSC injunction suit[57] which United characterizes as "an injunction against exercise of FPC regulatory jurisdiction."[58]

Unlike the cases cited by petitioners, where the only injury incurred by the parties seeking court relief was the burden and expense of participating in an agency hearing which this Court does not view as irreparable injury[59] LPL alleged in its sworn complaint in the District Court a material danger of a blackout or brownout of electrical service in a wide geographical area resulting in incalculable damages; that it has no adequate alternate means of generating electricity and would permanently lose sales. Thus, the test of the extent of the injury which will be caused by exhaustion of administrative remedies is clearly satisfied here. The question of certificate jurisdiction was decided by the Fifth Circuit upon the basis of undisputed facts and purely as a matter of statutory interpretation and the applicability of its own *Florida Parishes* decision.[60] Issues of this nature are within

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[57] Appendix Q, 27a.

[58] I.B. at 21.

[59] *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209, 220-221.

[60] *United Gas Pipeline Co.*, Docket No. CP 62-161, 30 F.P.C. 560 (1963), *aff'd. Louisiana Public Service Commission v. FPC*, 359 F.2d 525 (C.A. 5).

the specialized competence of the courts, not that of the FPC.

The petitioners have exposed the completely untenable nature of their views concerning the procedural issue of exhaustion of remedies by the inconsistency of the position they maintained before the two lower courts and the position they urge upon this Court. Below, they denied the jurisdiction of the District Court to hear and decide, on the merits, either the direct sale issue or the certificate issue in this case. Here, they seek review of the merits of the Court of Appeals decision on the former issue but have avoided such review on the latter issue. They seek to differentiate these two substantive issues[61] on the ground that the exhaustion of remedies problem has been mooted by the FPC's issuance of Opinion Nos. 606 and 606-A prior to the Court of Appeals decision. But, the FPC has now issued both its Opinion Nos. 610 and 610-A in the certificate case thereby, under their view, also mooting the very procedural issue they seek to have reviewed by this Court. Petitioners' effort to differentiate between the direct sale issue and the certificate issue on the ground that the Fifth Circuit squarely rejected the legal rationale of Opinion No. 606 is equally futile and unsound because that court's opinion also squarely rejected the legal rationale of Opinion No. 610.

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[61] Sol. Gen. Pet. 20; United Pet. 14, ftn. 26.

CONCLUSION

The State maintains that certiorari was improvidently granted in this case because there is no support, either in agency findings of fact or in the pleadings of petitioners, for the challenged claim that unless the FPC has power to reallocate United's direct sale gas volumes essential deliveries for domestic use will be jeopardized. In any event, the judgment of the Court of Appeals should be affirmed in its entirety.

Respectfully submitted

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APPENDIX A

GAS EXPORTING STATES RANKED IN ORDER OF PRODUCTION

(Millions cubic feet)

States	Deliveries	Receipts	Exports**
Louisiana	6,522,705	1,278,995	5,243,710
Mississippi	5,860,437	6,062,845	--
Texas	3,993,263	483,293	3,509,970
Tennessee	3,657,812	3,921,292	--
Kentucky	3,480,571	3,658,171	--
Alabama	2,863,691	3,362,432	--
Arkansas	2,519,758	2,711,753	--
Oklahoma	2,263,047	1,370,159	892,888
Kansas	2,251,621	1,956,718	294,903
Ohio	1,866,031	2,610,261	--
New Mexico	1,564,460	749,237	815,223
West Virginia	1,408,566	1,356,800	51,766
Missouri	1,308,335	1,706,524	--
Pennsylvania	1,291,854	2,022,425	--
Indiana	1,254,114	1,802,014	--
Arizona	1,226,680	1,421,296	--
Nebraska	1,073,502	1,276,838	--
Illinois	1,073,480	3,230,920	--
Georgia	1,016,515	1,333,701	--
Iowa	973,565	1,296,021	--
South Carolina	848,423	994,488	--
Virginia	823,196	957,370	--
North Carolina	710,066	918,423	--
Maryland	661,936	830,054	--
New Jersey	484,644	801,428	--
Idaho	360,616	402,737	--
Washington	341,012	487,610	--
Oregon	260,308	350,678	--
Wyoming	258,667	74,071	184,596
New York	234,203	937,040	--
Minnesota	156,966	482,966	--
Utah	141,310	220,174	--
Colorado	89,723	253,398	--
Connecticut	89,137	146,579	--
Rhode Island	71,218	94,348	--
Michigan	29,770	776,101	--
Massachusetts	21,537	159,908	--
Montana	20,789	71,177	--
Wisconsin	17,688	336,019	--
North Dakota	8,383	12,823	--
Alaska	2,982	0	2,982
Delaware	1,922	27,559	--
New Hampshire	1,887	11,577	--
South Dakota	1,286	36,251	--
National Total	49,003,658	50,948,658	10,993,418

Louisiana exports as a percentage of Total National Deliveries - 47.69%

* / Source: Table 57, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

** / Excess deliveries over receipts.

APPENDIX B

FIVE LARGEST GAS PRODUCING STATES RANKED IN ORDER OF 1969 GROSS PRODUCTION*

(Millions cubic feet)

States	Volume	Percentage of National Production
United States	22,679,145	100%
Texas	8,914,794	39.3%
Louisiana	7,561,027	33.3%
Oklahoma	1,741,677	7.67%
New Mexico	1,142,594	5%
Kansas	887,603	3.9%

*Source: Table 26, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

APPENDIX C

FIVE LARGEST GAS PRODUCING STATES RANKED
IN ORDER OF 1969 NET PRODUCTION*

(Millions cubic feet)

States	Volume	Percentage of National Production
United States	21,223,990	100%
Texas	7,964,698	37.5%
Louisiana	7,386,678	34.8%
Oklahoma	1,654,481	7.7%
New Mexico	1,142,191	5.38%
Kansas	885,822	4.17%

*Source: Table 27; Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

APPENDIX D

FIVE LARGEST GAS PRODUCTION STATES RANKED IN ORDER OF 1969 MARKETED PRODUCTION*

(Millions cubic feet)

States	Volume	Percentage of National Production
United States	20,698,240	100%
Texas	7,853,199	37.9%
Louisiana	7,227,826	34.9%
Oklahoma	1,523,715	7.36%
New Mexico	1,138,133	5.04%
Kansas	883,156	4.26%

*Source: Table 28, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

STATE OF LOUISIANA - DEPARTMENT OF CONSERVATION

ANALYSIS OF INTERSTATE GAS

IN MCF - 15.025 pounds Abs. 60 Degrees

	Deliveries To Other States	Less - Receipts From Other States	Net Interstate Deliveries	Total Louisiana Production (Net Mcf)	Percentage Interstate Deliveries
TOTAL - ALL TRANSPORTERS:					
Year 1952	1,319,064,548	712,728,169	606,336,379	1,284,339,790	47.21 %
1953	1,510,395,368	842,651,342	667,744,026	1,399,740,719	47.70 %
1954	1,714,902,151	978,739,074	736,163,077	1,464,953,448	50.25 %
1955	1,961,456,609	1,013,196,165	948,260,444	1,722,901,435	55.04 %
1956	2,279,911,313	1,160,187,721	1,119,723,592	1,937,565,711	57.79 %
1957	2,518,570,014	1,166,918,806	1,351,651,208	2,151,233,222	62.83 %
1958	2,725,379,461	1,226,329,657	1,499,049,804	2,353,683,939	63.68 %
1959	3,039,269,485	1,290,898,582	1,748,370,903	2,722,409,684	64.22 %
1960	3,366,493,305	1,317,987,805	2,048,505,500	2,994,361,745	68.40 %
1961	3,467,045,796	1,278,825,709	2,188,220,087	3,130,616,114	69.90 %
1962	3,672,600,177	1,163,229,049	2,509,371,128	3,513,123,651	71.43 %
1963	3,953,598,984	1,161,981,239	2,791,617,745	3,882,446,999	71.90 %
1964	4,149,540,354	1,156,908,774	2,992,631,580	4,181,052,266	71.58 %
1965	4,437,292,742	1,169,079,132	3,269,213,610	4,491,752,580	72.78 %
1966	4,850,968,525	1,109,229,151	3,741,739,374	5,148,167,184	72.68 %
1967	5,299,218,940	1,082,934,507	4,206,284,433	5,793,015,416	72.61 %
1968	5,765,336,709	1,033,758,149	4,731,628,560	6,492,728,904	72.88 %
1969	6,294,299,512	996,818,433	5,297,481,079	7,267,900,195	72.89 %
1970	6,748,070,324	1,029,836,978	5,718,233,346	7,796,747,096	73.34 %

NOTE: Gas production is net production after deducting gas returned to earth

SOURCE OF INFORMATION: Form R-3-T Gas Transporter's Report - using reports of only those transporters exporting or importing gas into Louisiana.

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APPENDIX E

STATE OF LOUISIANA - DEPARTMENT OF CONSERVATION

ANALYSIS OF NATURAL GAS SUPPLY
IN MCF - 15.025 pounds Abs. 60 Degrees

	ALL GAS COMPANIES			UNITED GAS PIPE LINE CO.		
	1960	1965	1970	1960	1965	1970
1. Produced in State	2,994,861,745	4,491,752,580	7,796,747,096	657,494,824	885,983,413	1,330,269,599
2. Imports into State	1,317,987,805	1,168,079,132	1,029,836,978	224,089,529	150,418,303	144,792,981
3. Total Gas Available(1+2)	4,312,849,550	5,659,831,712	8,826,584,074	881,584,353	1,036,401,716	1,475,062,580
4. Exports from State	3,366,493,305	4,437,292,742	6,748,070,324	299,637,510	319,821,477	485,701,523
5. Used in State (3-4)	946,356,245	1,222,538,970	2,078,513,750	581,946,843	716,580,239	989,361,057
6. Percentage of Gas Produced in State Used in State (5÷1)	31.5	27.2	20.6	88.5	80.8	74.4
7. Percentage of Gas Used in State Supplied by United Gas Pipeline Company				61.4	58.6	47.5
8. Increase in Exports* Related to 1960 Base	-	31.8	100.4	-	6.7	62.1

*Example (Col. 4)

$\frac{1970 - 1960}{1960} = 100.4\%$

*Source of Information: Form R-5-T Gas Transporter's Report - using reports of only those transporters exporting or importing gas into Louisiana.

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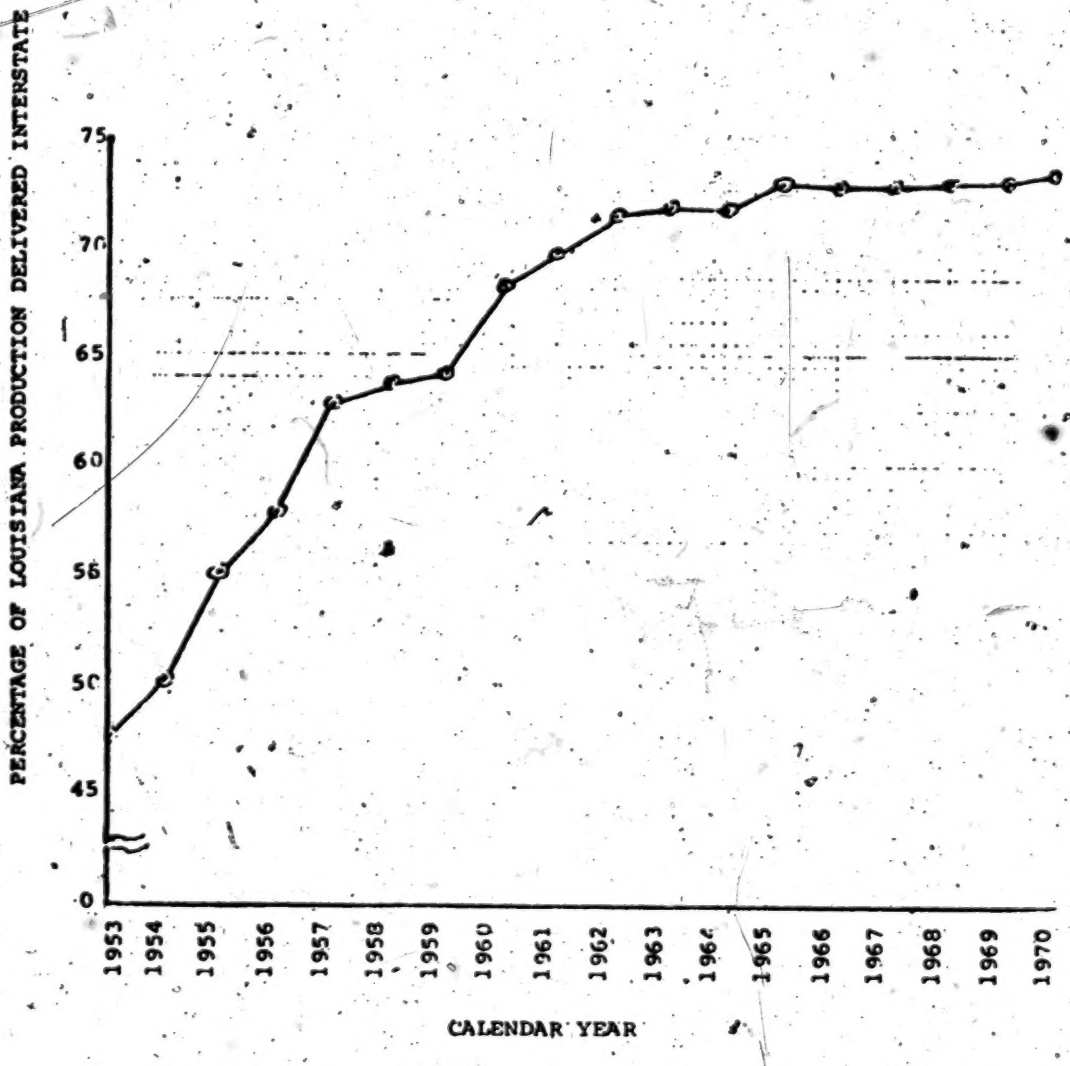
APPENDIX F

APPENDIX G

STATE OF LOUISIANA - DEPARTMENT OF CONSERVATION

TREND OF EXPORTS OF NATURAL
GAS PRODUCED IN LOUISIANA



APPENDIX H

LOUISIANA RECOVERABLE RESERVES, NEW FIELD, AND RESERVOIR DISCOVERIES AS A PERCENTAGE OF THE NATION *

(Million cubic feet)

Recoverable Reserves of Natural Gas

Year	United States	Louisiana	Louisiana Percentage of U. S.
1968	287,349,852	88,015,624	30.63%
1967	292,907,703	86,290,009	29.46%
1966	289,332,805	83,684,092	28.92%
1965	286,468,923	82,811,157	28.91%
1964	281,251,454	79,076,309	28.12%
1963	276,151,233	75,364,992	27.29%

New Field Discoveries

1969	1,769,557	262,140	14.81%
1968	1,376,429	376,919	27.38%
1967	3,170,520	750,844	23.68%
1966	2,947,329	433,345	14.70%

New Reservoir Discoveries

1969	2,043,219	1,002,308	49.06%
1968	1,545,612	687,902	44.51%
1967	2,524,651	1,026,915	40.68%
1966	3,110,396	1,284,014	41.28%

*Source: Table 2, Gas Facts, A Statistical Record of the Gas Utility Industry for 1963-1969.

APPENDIX I

STATE OF LOUISIANA - DEPARTMENT OF CONSERVATION

ANALYSIS OF NATURAL GAS SUPPLY FOR
UNITED GAS PIPE LINE COMPANY
IN MCF - 15.025 pounds Abs. 60 Degrees

Year	Total Available in State	Exports	Imports
1970	1,475,062,580	485,701,523	144,792,981
1969	1,442,660,890	476,552,185	141,408,910
1968	1,256,852,564	423,357,903	125,145,762
1967	1,122,302,791	379,492,001	111,487,781
1966	1,057,033,316	353,995,578	114,125,884
1965	1,036,401,716	319,821,477	150,418,303
1964	1,029,034,128	323,067,954	124,390,436
1963	(no records)	293,386,955	134,626,288
1962	860,752,808	264,444,967	152,373,933
1961	871,779,864	301,316,763	223,866,184
1960	881,584,353	299,637,510	224,089,529
1959	839,182,532	276,013,704	206,142,854
1958	806,976,272	264,351,336	198,226,154
1957	796,702,907	264,580,704	210,846,432
1956	803,881,299	259,042,333	220,963,719
1955	758,973,817	254,816,631	205,306,598
1954	764,600,945	244,535,502	197,895,391
1953	700,753,308	225,835,779	185,387,221
1952	514,698,050	121,540,119	

Source: Table 2, Gas Facts, A Statistical Record of the Gas Utility Industry.

APPENDIX J

COMPARISON OF PERCENTAGE OF ESTIMATES PROVED RECOVERABLE RESERVES OF NATURAL GAS IN 1969 FOR LOUISIANA AND THE NATION

(Millions cubic feet)

	United States	Louisiana	Percentage Utilization Represented
Production*	22,679,195	7,561,027	
Total Proved Recoverable Reserves**	275,108,835	85,056,639 N. 4,287,202 S.80,769,437	30.9% 1.5% 29.3%
Non-Associated Proved Recoverable Reserves**	211,873,282	69,429,161 N. 2,826,606 S.66,602,555	32.7% 1.33% 31.4%
Associated Dissolved**	59,633,644	15,514,268 N. 1,347,386 S.14,166,882	26.0% 2.25% 23.7%

* Source: Table 26, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

** Source: Table 2, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

APPENDIX K

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GAS REQUIREMENTS

FIRM INDUSTRIAL AND FIRM GENERATION

PERCENT FIRM OF TOTAL
(MILLION CUBIC FEET)

	FIRM INDUSTRIAL	FIRM GENERATION	TOTAL FIRM INDUSTRIAL AND GENERATION	TOTAL ALL USES	PERCENT FIRM INDUSTRIAL AND GENERATION OF TOTAL
LOUISIANA	1,181,538	315,274	1,496,812	1,790,250	84
TEXAS	1,933,846	835,163	2,769,009	4,008,246	69
ARKANSAS	189,877	94,333	284,210	418,346	68
NEVADA	12,658	21,287	33,943	54,399	62
MISSISSIPPI	129,647	83,595	213,242	371,361	57
FLORIDA	55,681	143,847	199,528	362,028	55
OKLAHOMA	56,703	224,331	281,034	540,566	52
W. VIRGINIA	80,750	45	80,795	215,504	37
INDIANA	191,067	3,299	194,366	546,422	36
OHIO	371,781	12,960	384,741	1,112,769	35
PENNSYLVANIA	292,585	683	293,268	841,296	35
ALABAMA	108,861	133	108,994	317,765	34
DELAWARE	8,162	88	8,250	27,320	30
ILLINOIS	283,860	72,341	356,201	1,216,941	29
IDAHO	11,683	-	11,683	45,320	26
TENNESSEE	72,972	-	72,972	300,787	24
MICHIGAN	170,611	27,854	198,465	877,807	23
MARYLAND	23,362	11,513	34,875	165,111	21
MAINE	394	-	394	1,906	21
VIRGINIA	28,346	-	28,346	144,013	20
CONNECTICUT	12,682	-	12,682	64,020	20
IOWA	62,359	424	62,783	378,610	17
N. CAROLINA	26,970	3	26,973	157,610	17
WYOMING	13,077	-	13,077	75,417	17
KENTUCKY	39,854	335	40,189	254,315	16
RHODE ISLAND	3,286	-	3,286	24,109	14
WASHINGTON	22,141	-	22,141	159,100	14
OREGON	13,296	-	13,296	93,715	14
WISCONSIN	38,970	3,049	42,019	328,652	13
ARIZONA	23,654	4,876	28,530	215,375	13
MINNESOTA	38,748	3,601	42,349	332,197	13
NEBRASKA	28,429	-	28,429	215,369	13
GEORGIA	44,568	-	44,568	368,446	12
NEW YORK	87,639	335	87,974	762,010	12
S. CAROLINA	18,916	-	18,916	161,523	12
KANSAS	56,934	7,319	64,253	602,834	11
NEW JERSEY	39,669	178	39,847	357,652	11
MISSOURI	37,729	5,043	42,772	439,698	10
COLORADO	17,186	5,180	22,366	254,814	9
MASSACHUSETTS	13,413	486	13,899	151,907	9
NEW MEXICO	4,717	8,322	13,039	167,263	8
MONTANA	2,590	1,234	3,824	82,468	5
CALIFORNIA	86,922	32,014	118,936	2,177,896	5
UTAH	3,618	-	3,618	122,358	3
NEW HAMPSHIRE	185	-	185	5,430	3
VERMONT	29	-	29	2,619	1
S. DAKOTA	160	-	160	31,435	1
N. DAKOTA	30	-	30	19,463	0
DIST. OF COL.	-	-	-	27,852	-
UNITED STATES*	5,942,153	1,919,145	7,861,298	21,392,314	37

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* ALASKA AND HAWAII OMITTED

GAS REQUIREMENTS

ELECTRIC GENERATION

PERCENT FIRM OF TOTAL ELECTRIC GENERATION
(MILLION CUBIC FEET)

	FIRM	INTERRUPTIBLE	TOTAL GENERATION	PERCENT FIRM OF TOTAL GAS
W. VIRGINIA	45	-	45	100
MARYLAND	11,513	130	11,643	99
ARKANSAS	94,333	7,127	101,460	93
OKLAHOMA	224,331	18,354	242,685	92
LOUISIANA	315,274	40,054	355,328	89
MISSISSIPPI	83,595	13,674	97,269	86
TEXAS	835,163	161,723	996,886	84
NEVADA	21,287	5,335	26,622	80
OHIO	12,960	3,401	16,361	79
FLORIDA	143,847	41,324	185,171	78
ILLINOIS	72,341	60,454	132,795	54
MICHIGAN	27,854	34,882	62,736	44
MONTANA	1,234	2,166	3,400	36
NEW MEXICO	8,322	41,468	49,790	17
DELAWARE	88	598	686	13
COLORADO	5,180	40,560	45,740	11
INDIANA	3,299	26,061	29,360	11
WISCONSIN	3,049	27,671	30,720	10
MISSOURI	5,043	59,911	64,954	8
MASSACHUSETTS	486	5,772	6,258	8
ARIZONA	4,876	56,648	61,524	8
PENNSYLVANIA	683	8,785	9,468	7
MINNESOTA	3,601	61,365	64,966	6
CALIFORNIA	32,014	639,049	671,063	5
KENTUCKY	335	8,446	8,781	4
KANSAS	7,319	161,528	168,847	4
IOWA	424	78,585	79,009	1
ALABAMA	133	16,088	16,221	1
NEW YORK	335	113,956	114,291	0
GEORGIA	-	60,688	60,688	-
NEW JERSEY	178	48,607	48,785	-
NEBRASKA	-	46,668	46,668	-
S. CAROLINA	-	43,114	43,114	-
TENNESSEE	-	18,562	18,562	-
N. CAROLINA	3	18,299	18,302	-
UTAH	-	13,921	13,921	-
S. DAKOTA	-	4,212	4,212	-
VIRGINIA	-	3,980	3,980	-
RHODE ISLAND	-	2,394	2,394	-
N. DAKOTA	-	352	352	-
CONNECTICUT	-	150	150	-
WYOMING	-	-	-	-
WASHINGTON	-	-	-	-
VERMONT	-	-	-	-
OREGON	-	-	-	-
NEW HAMPSHIRE	-	-	-	-
MAINE	-	-	-	-
IDAHO	-	-	-	-
DIST. OF COL.	-	-	-	-
UNITED STATES*	1,919,145	1,996,062	3,915,207	49

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* ALASKA AND HAWAII OMITTED.

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APPENDIX 4

GAS REQUIREMENTS

PERCENT FIRM OF TOTAL
(MILLION CUBIC FEET)

	FIRM				TOTAL FIRM	TOTAL ALL USES	PERCENT FIRM OF TOTAL
	RESIDENTIAL	COMMERCIAL	INDUSTRIAL	GENERATION			
OHIO	471,663	184,821	371,781	12,960	1,041,225	1,112,769	94
DIST. OF COL.	14,743	11,133	-	-	25,876	27,852	93
LOUISIANA	83,556	27,241	1,181,538	315,274	1,607,609	1,790,250	90
NEW HAMPSHIRE	3,198	1,365	185	-	4,748	5,430	87
ARKANSAS	48,055	27,743	189,817	94,333	360,008	418,346	86
NEVADA	6,721	5,849	12,656	21,287	46,513	54,399	86
CONNECTICUT	31,927	10,537	12,682	-	55,146	64,020	86
PENNSYLVANIA	315,802	102,859	292,585	683	711,929	841,296	85
MAINE	782	439	394	-	1,615	1,906	85
MASSACHUSETTS	84,055	28,459	13,413	486	126,413	151,907	83
N. DAKOTA	8,316	7,551	30	-	15,897	19,463	82
ILLINOIS	443,082	180,470	283,860	72,341	979,753	1,216,941	81
MICHIGAN	350,044	138,041	170,611	27,854	686,550	877,807	78
MARYLAND	73,245	21,417	23,362	11,513	129,537	165,111	78
TEXAS	269,055	97,003	1,933,846	835,163	3,135,067	4,008,246	78
RHODE ISLAND	11,606	3,614	3,286	-	18,506	24,109	77
INDIANA	155,323	67,333	191,067	3,299	417,022	546,422	76
NEW YORK	358,049	127,099	87,639	335	573,122	762,010	75
W. VIRGINIA	56,585	22,922	80,750	45	160,302	215,504	74
DELAWARE	8,706	3,235	8,162	88	20,191	27,320	74
MISSISSIPPI	37,999	19,652	129,647	83,595	270,893	371,361	73
OKLAHOMA	76,471	37,501	56,703	234,331	395,006	540,566	73
VIRGINIA	49,968	24,511	28,346	-	102,825	144,013	71
NEW JERSEY	147,279	54,877	39,669	178	242,003	357,652	68
FLORIDA	16,827	15,088	55,681	143,847	231,443	362,026	64
KENTUCKY	83,766	33,948	39,854	335	157,903	254,315	62
ALABAMA	63,039	25,021	108,861	133	197,054	317,765	62
COLORADO	79,402	51,393	17,186	5,180	153,161	254,814	60
MISSOURI	159,327	62,196	37,729	5,043	264,295	439,698	60
WISCONSIN	106,946	40,233	38,970	3,049	189,198	328,652	58
S. DAKOTA	11,185	6,813	160	-	18,158	31,435	58
IDAHO	8,052	6,063	11,683	-	25,798	45,320	57
MINNESOTA	104,881	36,947	38,748	3,601	184,177	332,197	55
TENNESSEE	48,602	37,636	72,972	-	159,210	300,787	53
MONTANA	22,288	17,925	2,590	1,234	44,037	82,468	53
IOWA	94,431	40,214	62,359	424	197,428	378,610	52
NEBRASKA	54,271	25,598	28,429	-	108,298	215,369	50
OREGON	19,028	12,289	13,296	-	44,613	93,715	48
UTAH	40,132	13,556	3,618	-	57,306	122,358	47
VERMONT	843	348	29	-	1,220	2,619	47
WASHINGTON	32,844	19,969	22,141	-	74,954	159,100	47
WYOMING	12,775	8,797	13,077	-	34,649	75,417	46
GEORGIA	89,217	33,939	44,568	-	167,724	368,446	46
N. CAROLINA	26,435	16,239	26,970	3	69,647	157,610	44
CALIFORNIA	585,471	177,693	86,922	32,014	882,100	2,177,896	41
ARIZONA	31,763	18,813	23,654	4,876	79,106	215,375	37
S. CAROLINA	24,580	7,737	18,916	-	51,233	161,523	32
KANSAS	95,099	34,287	56,934	7,319	193,639	602,834	32
NEW MEXICO	23,831	10,511	4,717	8,322	47,381	167,263	28
UNITED STATES*	4,941,265	1,958,925	5,942,153	1,919,145	14,761,488	21,392,314	69

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* ALASKA AND HAWAII OMITTED

APPENDIX N

JURISDICTION OF FEDERAL POWER COMMISSION OVER CERTAIN INTERSTATE SALES OF NATURAL GAS

Mr. MAGNUSON, Mr. President, by request, I introduce, for appropriate reference, a bill to amend the Natural Gas Act to vest jurisdiction in the Federal Power Commission over certain interstate sales of natural gas for industrial use. I ask unanimous consent that a letter from the Chairman of the Federal Power Commission, requesting the proposed legislation, be printed in the RECORD.

The VICE PRESIDENT. The bill will be received and appropriately referred; and, without objection, the letter will be printed in the RECORD.

The bill (S. 1734) to amend the Natural Gas Act to vest jurisdiction in the FEDERAL POWER COMMISSION over certain interstate sales of natural gas for industrial use, introduced by Mr. Magnuson, by request, was received, read twice by its title, and referred to the Committee on Commerce.

The letter presented by Mr. Magnuson is as follows:

FEDERAL POWER COMMISSION

Washington, D.C., June 12, 1963.

HON. LYNDON B. JOHNSON,
President of the Senate,
Washington, D.C.

DEAR MR. PRESIDENT: I am submitting herewith as part of the Commission's 1963 legislative program a

proposed amendment to section 1 of the Natural Gas Act to give the Federal Power Commission jurisdiction over direct interstate sales of natural gas by producers and by pipelines to industrial consumers. Most industrial consumers purchase natural gas from local distribution companies which, in turn, purchase if from interstate pipelines for distribution to residential, commercial, and industrial customers. Not infrequently, however, industrial customers buy from the pipeline directly or in some instances directly from a producer with a pipeline providing merely a transportation function.

Under existing law the Commission's authority is limited to sales for resale in interstate commerce: hence, *the price and other terms of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority.* Similarly, existing law can be construed to permit a natural gas producer to escape the Commission's rate jurisdiction by contracting directly with industrial consumers and having a new or existing pipeline transport gas for the producer's account.[1] As explained more fully below, this gap in the Commission's jurisdiction has not been closed by adequate State regulation. *As a result, the pipeline companies have set industrial gas prices to some industrial customers at levels exceeding costs plus reasonable profits, and are free to discriminate between industrial customers. And natural gas producers seeking to escape the Commission's jurisdiction have attempted to*

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[1] See, *e.g., FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (dictum): Southern California Edison Co., CPS-172, application filed Dec. 23, 1960. Order Permitting Withdrawal of Application and Terminating Proceeding issued Jan. 3, 1963; Gulf Pacific Pipeline Co., CP63-223, applications filed Feb. 12, 1963.

make direct industrial sales of gas which would be transported over pipelines serving only industrial customers, even though this may lead to uneconomic transportation and may divert natural gas resources from consumer markets where its use is most in the public interest.[2]

The Natural Gas Act has been construed to leave the States free to regulate direct industrial sales, but many simply do not do so. In several States, attempts by regulatory commissions to assert jurisdiction over these sales have been thwarted by the pipelines in the State courts which have held that interstate pipelines selling to individual consumers on a contract basis are not "public utilities"[3] or that such sales are not "intrastate".[4] Consequently, these courts have held, the transactions are beyond the reach of the State commissions. Even the States which do regulate direct pipeline industrial sales frequently

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[2] Southern California Edison Co., *supra*, note 1: Gulf Pacific Pipeline Co., *supra*, note 1.

[3] *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 116 N.E. 2d 394 (1953); *Public Utilities Commission v. Colorado Interstate Gas Co.*, 142 Colo. 361, 351 P.2d 241 (1960). See *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468, 123 N.E. 2d 503 (1955); *City of St. Louis v. Mississippi River Fuel Corp.*, 97 P.2d 727 (8th Cir., 1938). Contra: *Re Panhandle Eastern Pipeline Co.*, 21 P.U.R. 2d 267 (1957) (Illinois Pub. Service Commission): *Re: Cities Service Gas Co.*, 1931 E. P.U.R. 11 (Mo. Public Service Commission).

[4] *Texas Gas Transmission Corp. v. Mississippi Public Serv. Comm'n.*, 241 Miss. 826, 133 So.2d 526 (1961); *United Gas Pipe Line Co. v. Mississippi Public Service Commission*, 241 Miss. 762, 133 So.2d 521 (1961).

only require that the pipelines file rates negotiated between them and industrial customers, but, at least in the absence of complaint, do not examine the contracts to see if they are fair, reasonable, and nondiscriminatory.[5] The absence of effective State regulation of these sales may reflect the difficulty a State commission would face in determining the portion of an interstate pipeline's total cost of service applicable solely to direct industrial sales made within the particular State. That determination would be extremely complex and time consuming.

This system invites discrimination between customers on the basis of bargaining power – one of the principal evils public utility rate regulation is designed to cure.

Since State regulation of these sales, in most cases, is either non-existent or ineffective, industrial rates charged by interstate pipelines are often much higher than could be justified by cost considerations. The attached schedule shows just how far out of line some pipelines' industrial sale prices are. Based on cost of service studies in connection with relatively recent rate cases, the figures show that seven out of eight major pipelines' revenues from industrial sales exceeded costs – including a reasonable return on investment – by amounts ranging downward from 57 percent. Only one company's revenues from such sales approximated costs (revenues were about 1½ percent greater) and one company's prices to its direct industrial customers

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[5] Minutes of the third meeting of the Federal Power Commission Natural Gas Advisory Council, Oct. 31, 1962, p. 3. A thorough search of reported State public utility commission decisions turned up only one case in which a State commission altered a rate an interstate pipeline charged an industrial customers.

yielded less than an adequate rate of return. The extent to which some industrial customers may have been required to pay prices higher than might have been the case had the Commission exercised jurisdiction over the ratio is suggested by one case where the company's rate for a sale subject to the jurisdiction of this Commission to a local distributor was 23.2 cents per thousand cubic feet while its rate for an unregulated direct sale to an industrial consumer was 45 cents per thousand cubic feet.[6]

In addition, very large percentage increases are sometimes forced upon industrial consumers: in one instance an industrial rate was raised almost 50 percent in 1 year.[7]

These facts strongly suggest that competition alone is often inadequate to prevent rates for industrial gas sales from rising beyond cost-justified levels. This is not surprising, since in some regions and for some purposes, gas is the only available or practical fuel[8] and a particular pipeline the only available supplier.

Not only is Commission jurisdiction over direct industrial sales necessary to protect industrial gas consumers, but it would also materially assist the Commission in better discharging its existing regulatory responsibilities.

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6 *Panhandle Eastern Pipe Line Co.*, 21 P.U.R. 3d 267, 276 (1957). The rate to the distributor should be somewhat lower to reflect certain economies. However, the magnitude of the difference is probably out of proportion to that which could be justified by cost considerations.

7 *Public Utilities Commission v. Colorado Interstate Gas Co., supra*, note 3.

8 See, *e.g., Public Utilities Commission v. Colorado Interstate Gas Co., supra*, note 3, at 255.

One such responsibility is to make sure that wellhead prices for gas flowing in interstate commerce are "just and reasonable." Where producers make direct industrial sales outside the Commission's jurisdiction, the prices they receive are apt to exceed the Commission's area rate ceiling.[9] *It is easy to understand that this gap in the statutory scheme for producer rate regulation provides an artificial incentive to producers to sell gas directly for industrial use rather than to pipelines for sale ultimately to domestic as well as industrial consumers.* These above-ceiling sales also exert an inflationary pressure on jurisdictional sales by producers and may lead to widespread price increase under existing contracts for gas already flowing subject to the Commission's jurisdiction. This is because many existing contracts provide for price increases in the event a producer in the area receives a higher price than the seller is currently receiving from an interstate, jurisdictional pipeline.[10] As a result, unregulated direct industrial sales by producers may lead to increases in the prices of gas paid by pipelines and, ultimately by residential, commercial, and industrial customers whom the Natural Gas Act seeks to protect.

Another problem which would disappear if the Commission had jurisdiction over direct sales to industrial customers is the practice of some pipelines to refuse to deliver

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[9] See authorities cited at note 1, *supra.*

[10] See, *e.g., Shell Oil Co.*, Docket No. R161-515, Opinion No. 382 (decided Mar. 15, 1963), where new purchases from producers in west Texas were alleged to have triggered price increases under El Paso Natural Gas Co.'s contracts with other producers. The increase to which these producers were alleged to have become entitled, in turn, allegedly triggered price escalation clauses in a contract between El Paso and still another producer. See also *Pure Oil Co.*, 25 FPC 383, 387-91 (1961).

additional gas to local distributors for resale in order to sell it directly to industrial consumers.[11] Since the unregulated direct sale can frequently be made at higher rates, the reason for the pipeline's preference is obvious. *But this practice often may not be in the public interest. In the first place, it means that less gas is available for resale to consumers for home heating – a use which the Commission, with court approval,*[12] *has found may frequently be the best use for natural gas.*

Finally, direct industrial sales by pipelines or producers may, on occasion, prevent local distributors from making industrial sales within their service areas. These sales benefit home-heating customers by enabling local distributors to make sales during off-peak periods (*i.e.*, when warm weather reduces demand for space heating), and thus to spread the cost of their distribution facilities and those purchased gas costs which do not vary with the amount

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[11] The problem is illustrated by the proceedings in *Arkansas-Louisiana Gas Co.*, Opinion No. 355, Apr. 18, 1962, 27 FPC 697, reversed *sub nom Granite City Steel Co. v. F.P.C.*, C.A.D.C. Nos. 17150, 17151, May 23, 1963. Extension of the time in which to seek rehearing has been requested. There a group of Mississippi's distributor customers sought to compel the pipeline to sell them additional gas which it was making available to direct industrial customers at rates not subject to Commission jurisdiction and exceeding those the Commission permitted Mississippi to charge its distributor customers. *The Commission's order allocating additional gas to the distributors was set aside on review.*

[12] *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, *supra*, note 1.

taken[13] over a greater volume of sales. The cost per unit of gas that the residential and commercial space-heating customers must pay is, in turn, decreased. *Thus, Commission jurisdiction to regulate direct industrial sales by pipelines could put an end to the pipelines' preference for such sales over sales to local distributors for resale, thereby benefiting the natural gas consumers for whose protection the Natural Gas Act was passed.*

For these reasons – protection of industrial consumers, prevention of widespread field price increases under existing contracts, and removal of present incentives to withhold gas from local distributors in order to make it available for direct industrial sales – the Commission strongly recommends that it be given jurisdiction over direct industrial sales by natural gas companies. This authority will enable the Commission to require that interstate industrial gas sales will be made at such prices *and on such terms* as to realize the potential benefits of such sales to both industrial and domestic consumers.

Commissioner O'Connor has asked me to note his opposition to this proposal.

Sincerely,

JOSEPH C. SWIDLER,
Chairman

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[13] Many pipeline rate schedules provide for both a commodity charge – so much for each unit of gas taken – and a demand charge – so much for each unit of gas that the pipeline stands ready to deliver. The latter charge does not vary with the volume of gas the distributor actually uses.

Note: Emphasis added.

APPENDIX O

EXCERPT FROM APPELLANT'S BRIEF IN
PANHANDLE EASTERN PIPE LINE CO. v.
PUBLIC SERVICE COMMISSION OF INDIANA,
332 U.S. 507

More important, with respect to the question presented here, however, is the conclusion of the court below that as a public utility, appellant will be obligated to serve all who apply and will not be permitted to select its customers. If this is true in Indiana, it is also true in each of the several states in which appellant operates. It is inconceivable that regulation of this character can fail to bring about not only conflicts between the states but conflicts between the states and the Federal Power Commission.

As shown by the record (ante, p. 14) substantially all industrial consumers' contracts are on an interruptible basis and the service is curtailed when the supply would be insufficient to supply the firm commitments of local distributing companies for domestic and commercial customers. There is uncontroverted evidence that any curtailment program must be based on the operation of the pipeline system as an entirety (R 174, 175). Moreover the provisions of the Natural Gas Act giving the Federal Power Commission jurisdiction over the construction of facilities for the interstate transportation of natural gas make it extremely doubtful whether appellant could, if ordered to do so by a state commission, enlarge its

interstate transportation facilities in order to serve new industrial customers without authorization from the Federal Power Commission. (As stated ante, p. 10, such a certificate was applied for and issued with reference to the DuPont service over the objection of the appellee Commission.)

The Federal Power Commission has also asserted the right to prevent a pipe line company from serving new customers, even though additional transportation facilities are not required if that Commission determines that such service would impair ability to render satisfactory service to existing customers. (Emphasis Added.)

APPENDIX P

Comparison of Curtailment Provisions of United's FPC Gas Tariff in Effect Until November 14, 1971 and Typical United Direct Sale Contract

United Gas Pipe Line Company FPC Gas Tariff First Revised Volume No. 1 General Terms and Conditions Original Sheet No. 71, First Revised Sheet No. 72	Typical United Direct Sale Article IX
"12. IMPAIRMENT OF DELIVERIES	"IMPAIRMENT OF DELIVERIES
12.1 *Proration of Impaired Deliveries*—Seller delivers gas to (a) gas utilities, and pipeline companies which deliver gas to gas utilities, for resale to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its consumers, then, Seller may, without liability to Buyer, prorate its gas supply in the manner hereinafter set forth after first making allowance for all gas required by Seller for the operation of any of its facilities. The gas requirements of gas utilities, and pipe line companies delivering gas to gas utilities, which sell gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the require-	Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other contract consumers, including Buyer."

ments of such gas utilities and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities, and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities or from pipe line companies, purchasing their requirements from Seller; and, if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. After the above requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, to the extent of gas sold by them to their other consumers. In the event of any shortage of gas as in this Section provided, Buyer shall discontinue service of gas to its consumers during the period of any such shortage to the extent which may be necessary consistent to the provisions hereof.

In certain instances Seller supplies less than the full re-

quirements of certain of its customers, and there may be times when Seller supplies less than the full requirements of Buyer hereunder and it is the intent of this Section that any priority granted hereunder shall run only to that part of the requirements of each ultimate consumer as is being currently supplied by gas furnished by Seller, directly or indirectly."

APPENDIX Q

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LOUISIANA PUBLIC SERVICE COMMISSION, Plaintiff, v. UNITED GAS PIPE LINE COMPANY; PENNZOIL UNITED, INC.; CHAIRMAN JOHN N. NASSIKAS, COMMISSIONER JOHN A. CARVER, JR., COMMISSIONER ALBERT B. BROOKE, JR., COMMISSIONER PINKNEY WALKER, AND COMMISSIONER RUSH MOODY, JR., FEDERAL POWER COMMISSION, Defendants.	)	CIVIL ACTION NO._____

COMPLAINT

FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY AND PERMANENT INJUNCTION

Now comes Louisiana Public Service Commission (LPSC) and for its complaint against the defendants, United Gas Pipe Line Company (United), Pennzoil United, Inc. (Pennzoil), and the Chairman and individual Commissioners of the Federal Power Commission (FPC), respectfully alleges:

THE PARTIES

1. Plaintiff, LPSC, is an agency of the State of Louisiana, charged by the laws of Louisiana with the authority and duty, inter alia, of regulating the rates and services of gas and electric utilities in that state, and with exercising general supervision over such utilities, and, in addition, with protecting the interests of gas and electric consumers in the State of Louisiana. (Article VI Section 4 of the Louisiana Constitution, as amended in 1964, and Title 45 of the Louisiana Revised Statutes). The LPSC is a separate entity which may sue and be sued.

2. Defendants, United and Pennzoil, are corporations, duly organized and existing under and by virtue of the laws of the State of Delaware, and having their principal places of business

in the State of Texas.

3. The Federal Power Commission is an administrative agency established by Congress to regulate certain aspects of the transportation and sale of natural gas in interstate commerce and natural gas companies engaged therein. It has no jurisdiction over intrastate sales or transportation of natural gas, or over rates and services of an intrastate gas pipeline. The named Chairman and Commissioners are the members of said Commission and have been individually joined as defendants because they are acting beyond the scope of their duly granted statutory authority under the Natural Gas Act.

JURISDICTION

4. This Court has jurisdiction under 28 U.S.C. Sec. 1332, because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000.00 and is between citizens of different states.

INTEREST OF THE PLAINTIFF

5. Plaintiff appears to protect the interests of the ultimate consumers of natural gas supplied by United which is used for residential, commercial and industrial purposes within Louisiana. In 1970, United supplied 47.5% of all natural gas consumed within the state. Some 380 cities and towns and 94 industrial customers in Louisiana are wholly dependent upon it for their natural gas requirements. Approximately 2,219,000 Louisiana residents depend upon United for gas used for space heating, cooking and water heating.

6. United directly serves 63 privately and municipally owned gas distribution systems in Louisiana. It also supplies United Gas, Inc. which owns and operates another 84 distribution systems within the state. The rates and services of all of these local utilities are regulated by LPSC.

7. Louisiana is the largest gas exporting state and the second largest gas producing state in the nation. In 1969, it delivered to other states 48% of all natural gas exported by gas producing states to meet the needs of other states which cannot supply their own requirements. Over 73% of its total production was exported to other states, on a net delivery basis (after subtracting interstate receipts from gross deliveries) in that year.

8. In 1970, United purchases 1,098,504,532 mcf in Southern Louisiana of which it used only 203,643,624 mcf, or 20%, in the New Orleans district (Green System). This figure is derived from Exhibit No. 32 in FPC Docket No. CP71-89 which has been attached as Appendix A to this Complaint. This Exhibit compares for the years 1962 through 1970, inclusive, the total gas purchased by United in Southern Louisiana, the annual volume of intrastate sales in its Old District 5 which is essentially the Green System and the gas purchased in Louisiana but sold outside the Green System.

9. United is not a typical interstate pipeline. It has singular and unique characteristics which are the direct and proximate cause of its curtailment of its Louisiana resale and direct sale customers, both those served from its interstate system and those served from its intrastate system in southern Louisiana, (the Green System and Purple System). United performs the same role as other interstate pipelines by serving as a supplier of gas sold at resale by municipally and privately owned gas distribution utilities in the Gulf Coast states and also supplies gas to power plant customers and direct industrial customers in such states who consume it for their own use. However, its major and predominant role is to act as a gigantic gas gatherer collecting gas from the producing areas in the Southwestern United States which it sells to, or transports for, five major interstate pipeline. It is, in terms of volume, the world's largest transporter of natural gas and

its system purchased, gathered and transported more than 1.8 trillion cubic feet in 1970.

10. Louisiana is a producing state which exports vast quantities of gas to other states. United's gas shortage does not therefore reflect any imbalance between the requirements of its Louisiana customers and locally produced gas. Rather, it results from this pipeline's deliberate management decision to use ever-increasing quantities of Louisiana produced gas to meet the needs of its interstate customers. Using 1960 as a base year, United increased its exports of Louisiana gas by 6.5% in 1965. By 1970, this percentage had increased to 62%. This trend has been continuing at an accelerating pace and if the FPC succeeds in usurping plaintiff's lawful and continuing jurisdiction over United's separate intrastate pipeline syste, exports will progressively increase and deliveries to United's Louisiana customers will be correspondingly reduced. United is a wholly-owned subsidiary of Pennzoil. As the Fifth Circuit ruled in Louisiana Power & Light Co. v. United Gas Pipe Line Company, et al., and Federal Power Commission No. 71-1773, on January 14, 1972, United controlled, through an affiliate, gas wells in Louisiana which produced more than the entire amount of gas deliberately and unnecessarily injected into the separate Green System in 1970 which could have been used in Louisiana (Slip Op. p. 23).

NECESSITY FOR INJUNCTIVE RELIEF

11. On September 28, 1971, plaintiff adopted its Special Order No. 7-71,*/ (Appendix B), instituting a comprehensive examination and investigation of United's rates and services on its

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*/ Subsequently, LPSC issued Special Orders 17-71 and 21-71 (Appendices C & D).

intrastate pipeline facilities and systems in southern Louisiana, including curtailment practices and delivery volumes. This Order expressly prohibited further commingling by United of interstate or offshore gas with intrastate gas and further interconnections between its interstate system and its intrastate system or that of other pipelines or any out of state distributors or producers or intrastate pipelines, distributors or producers unless it first obtained the permission of the LPSC. This prohibition was applicable until the final conclusion of this LPSC proceeding, including all phases of court review. Its purpose was to preserve the status quo during the pendency of litigation concerning the question of whether the FPC or the LPSC had jurisdiction over United's separate intrastate system.

12. United, under the inducement, direction and control of Pennzoil, has been injecting ever-increasing quantities of interstate and offshore gas into its Green System as shown by the FPC's findings in Opinion No. 610 under the heading "The Unauthorized Gas Flows Establish Jurisdiction" (Slip Op., pp. 8-13). */

13. Opinion No. 610 unlawfully ousts plaintiff of its jurisdiction over United's Green System; remands the proceeding to an FPC Examiner for receipt of additional evidence to lay the foundation for unlawfully discriminating against intrastate resale and direct customers served from that system; compels them to pay higher rates in violation of their service agreements and direct sales contracts and provides that they shall continue to be served only on an emergency basis and illegally subjects them to the conditions that United's intrastate facilities be operated as part of its integrated interstate system and that its customers submit to the Commission's jurisdiction, in all respects, pending its final decision in the remanded proceedings which are certain to be of prolonged duration.

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*/ (Appendix E).

14. The judgment of the Fifth Circuit Court of Appeals that the Green System is an intrastate pipeline subject only to state jurisdiction constitutes a full adjudication of this issue by a court of competent jurisdiction. It is binding on United, Pennzoil and the FPC which were all parties to Civil Action No. 16637-M before this Court. Until that judgment is vacated, the FPC lacks authority to make any substantive orders which are inconsistent therewith. Therefore, issuance of FPC Opinion No. 61[illegible] on February 9, 1972 after the Fifth Circuit decision became binding under the principles of res judicata and estoppel by judgment was illegal and an ultra vires act by the named defendant Commissioners.

IRREPARABLE INJURY

15. Plaintiff initiated its currently pending comprehensive investigation of United and made its express prohibition against further commingling and interconnections in order to preserve the status quo during the pendency of Court litigation concerned with whether the federal or state agency has jurisdiction over United's separate intrastate pipeline systems in southern Louisiana. Unless enjoined, Opinion No. 610 by authorizing and directing United to take such prohibited action, will vitiate and destroy the effectiveness of the LPSC order. Furthermore, Opinion No. 610 (Slip Op. Par. 53, p. 18) squarely holds that the FPC's jurisdiction under the Natural Gas Act attaches even when the commingling of interstate and intrastate gas and any operational integration between United's interstate and intrastate system results from the deliberate and unlawful action of the pipeline, contrary to both the Natural Gas Act and the order of the LPSC. While plaintiff disagrees with this legal conclusion, it should not be subjected to the material risk that the courts will uphold the FPC's position in which case United's unlawful actions, aided and abetted by the equally unlawful actions of the individual

members of the Commission, will have completely and permanently usurped the LPSC's lawful and continuing jurisdiction.

16. The rates lawfully prescribed by LPSC are legislative future acts, which it has been delegated authority to perform by the state legislature, which cannot be neutralized and vitiated by the unilateral action of a regulated company in filing higher company-made rates. Under the Fifth Circuit's binding judgment, plaintiff has exclusive jurisdiction to fix rates and charges for the sale of gas by United to its resale utility customers served by Green System facilities.

17. The FPC concedes that its curtailment jurisdiction is utterly dependent upon its certificate jurisdiction. Thus, the FPC cannot enforce United's curtailment program against Green System customers if such facilities are intrastate in nature and beyond the scope of its statutory powers. By the same token, the FPC cannot compel such customers to pay United rates and charges which are substantially in excess of the just and reasonable rates lawfully prescribed by LPSC. At present, the Green System is an intrastate pipeline subject exclusively to the regulatory jurisdiction of plaintiff. Opinion No. 610 makes it manifest that an assumption of jurisdiction by the FPC will deny Green System customers equality with other existing customers served by United's interstate system; abrogate their service agreements and direct sales contracts and compel them to pay substantial rate increases, in advance of any FPC determination of their lawfulness.

18. The damages which will be suffered by the economy of the state and the welfare of its citizens are incalculable in monetary terms and of a type which cannot be remedied by an award of damages. Since Louisiana is a producing state which has always enjoyed an assured and abundant supply of gas its industries and economic welfare are abnormally and heavily dependent upon

continued access to this natural resource of the state. Last, but not least, an assumption of jurisdiction by the FPC will increase the use of this local resource to serve the needs of other states. So long as the Green System remains an intrastate pipeline, the LPSC can take appropriate action on the basis of record evidence to insure that a larger and fairer share of Louisiana gas is used within the state.

19. Consequently, the LPSC, resale customers and direct customers of United served by the Green System and the ultimate end users of gas within the state will be substantially, permanently and irreparably damaged unless United, Pennzoil and the members of the FPC are enjoined.

PRAYER

Accordingly, LPSC invokes the provisions of 28 U.S.C. Sec. 1332, as well as this Court's general equity jurisdiction, and respectfully requests that the Court:

(a) Issue a temporary restraining order, in accordance with Rule 65 of the Federal Rules of Civil Procedure, in the form attached hereto, and

(b) Issue a preliminary injunction in accordance with Rule 65 of the Federal Rules of Civil Procedure pending a hearing on LPSC's Application for Permanent Injunction, and

(c) Issue its permanent injunction, which respectively shall, until such time as the judgment of the Fifth Circuit Court of Appeals in No. 71-1773 respecting the intrastate nature of the Green System may be vacated:

Restrain and enjoin United and Pennzoil from operating its Green System intrastate pipelines as part of its integrated interstate pipeline system and ordering said

companies to operate such pipelines so as to maintain and perpetuate their intrastate nature in accordance with applicable orders of LPSC.

Restrain and enjoin the individual members of the FPC from authorizing or directing United to serve its Green System customers only on an emergency basis and subject to the condition that these facilities be operated as part of its integrated interstate pipeline system, be fully subject ot its exclusive jurisdiction and subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in the remanded proceedings in Docket No. CP71-89, and from granting any presently pending or subsequently filed applications for certificates of public convenience and necessity which would be inconsistent with said applicable orders of LPSC and said persons are hereby affirmatively directed to authorize United to fully continue the service rendered to its Green System customers prior to the issuance of Opinion No. 610.

(d) Grant such other and further relief at law or in equity as the Court may deem just and proper.

LOUISIANA PUBLIC SERVICE COMMISSION

By: /S/ Joseph H. Kavanaugh
Joseph H. Kavanaugh

ATTORNEY FOR LOUISIANA PUBLIC SERVICE COMMISSION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LOUISIANA PUBLIC SERVICE COMMISSION, Plaintiff, v. UNITED GAS PIPE LINE COMPANY; PENNZOIL UNITED, INC.; CHAIRMAN JOHN N. NASSIKAS, COMMISSIONER JOHN A. CARBER, JR., COMMISSIONER ALBERT B. BROOKE, JR., COMMISSIONER PINKNEY WALKER, AND COMMISSIONER RUSH MOODY, JR., FEDERAL POWER COMMISSION, Defendants.	)	CIVIL ACTION NO._____

TEMPORARY RESTRAINING ORDER

This cause came on to be heard on the verified complaint of plaintiff and the certificate of Joseph H. Kavanaugh, Esq., Attorney for plaintiff, and it appearing to the Court that the defendants are committing acts, and are about to commit acts as set forth in plaintiff's complaint, and will continue to do so unless restrained by order of this Court, and that immediate and irreparable injury, loss or damage will result to plaintiff before notice can be given and the defendants and their attorney or attorneys can be heard in opposition to the granting of a temporary restraining order; and that the Fifth Circuit Court of Appeals entered a judgment in Louisiana Power and Light Company v. United Gas Pipe Line Company, et al. and Federal Power Commission, No. 71-1773, on January 14, 1972, that United's Green System is an intrastate pipeline not subject to regulation by the Federal Power Commission; and it further appearing that the individual members of said Commission have committed an ultra vires act in issuing the findings and ordering clauses of Opinion No. 610 on February 9, 1972 insofar as it pertains to

said Green System; and it further appearing that the Louisiana Public Service Commission in its Special Order 17-71, as modified by Special Order 27-71, respectively issued on September 28, 1971 and November 29, 1971 has prohibited United Gas Pipe Line Company from further commingling interstate or offshore gas with intrastate gas and further interconnecting its interstate system and its intrastate system or that of other pipelines or any out of state distributors or producers or intrastate pipelines, distributors or producers unless it first obtains the permission of the Louisiana Public Service Commission; and it further appearing that unless restrained by this Court defendants United and Pennzoil with the authorization and by the direction of the FPC will vitiate and destroy the effectiveness of this prohibition and expose Green System customers and ultimate end users of gas within Louisiana to a material risk that this intrastate pipeline will become an interstate pipeline to their great and permanent detriment and prejudice, and to the continuing detriment and prejudice of the economy of Louisiana and the welfare of its citizens;

IT IS THEREFORE ORDERED that United Gas Pipe Line Company, its officers, agents, representatives, employees, attorneys, and all persons in active concert and participation with it, including its parent company, Pennzoil United, Inc. be and they hereby are restrained from in any manner either directly or indirectly operating the Green System intrastate pipelines as part of United's integrated interstate pipeline system in violation of the said Special Orders of the Louisiana Public Service Commission, and said persons are hereby affirmatively directed to operate such pipelines so as to maintain and perpetuate their intrastate nature in accordance with said orders and any lawful later orders which may be made;

IT IS THEREFORE FURTHER ORDERED that Chairman John N. Nassikas, Commissioner John A. Carver, Jr., Commissioner Albert

B. Brooke, Jr., Commissioner Pinkney Walker, and Commissioner Rush Moody, Jr., of the Federal Power Commission be and they hereby are restrained from in any manner either directly or indirectly authorizing or directing United to serve its Green System customers only on an emergency basis and subject to the condition that these facilities be operated as part of its integrated interstate pipeline system, be fully subject to its exclusive jurisdiction and subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in the remanded proceedings in Docket No. CP71-89, and from granting any presently pending or subsequently filed applications for certificates of public convenience and necessity which would be inconsistent with said applicable orders of Louisiana Public Service Commission, and said persons are hereby affirmatively directed to authorize United to fully continue the service rendered to its Green System customers prior to the issuance of Opinion No. 610.

IT IS THEREFORE FURTHER ORDERED that plaintiff first give security in the sum of $5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, such bond to be approved by the Court or by the Clerk of the Court; and

IT IS FURTHER ORDERED that this Order expire within _____ days after entry unless within such time as the Order for good cause shown is extended, or unless the defendant consent that it may be extended for a longer period; and

IT IS FURTHER ORDERED that plaintiff's application for a preliminary injunction be sent down for hearing on the _____ day of _____, 1972 at _____ A.M. at _____, Louisiana; and

IT IS FURTHER ORDERED that copies of this order and of plaintiff's complaint and supplemental complaint and the attachments submitted therewith, together with proper summons issued by the Clerk of this Court, be immediately served by the United States Marshal

upon the defendants.

Issued at _____, Louisiana, February _____, 1972 at _____ o'clock .M.

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UNITED STATES DISTRICT JUDGE

APPENDIX R

LOUISIANA PUBLIC SERVICE COMMISSION

SPECIAL ORDER NO. 7-71

AT A SESSION OF THE LOUISIANA PUBLIC SERVICE COMMISSION ON SEPTEMBER 28, 1971, CONSIDERATION WAS GIVEN TO THE FOLLOWING FACTS:

UNITED GAS PIPELINE COMPANY (UNITED) HAS TAKEN CERTAIN ACTIONS WHICH HAVE ALREADY SUBSTANTIALLY IMPAIRED, AND WILL PLACE IN EVEN GREATER FUTURE JEOPARDY, THE SUPPLY, TRANSMISSION, AND DISTRIBUTION OF A RELIABLE AND ADEQUATE QUANTITY OF GAS FOR USE BY DOMESTIC, COMMERCIAL, AND INDUSTRIAL CONSUMERS IN THE STATE OF LOUISIANA PURCHASING DIRECTLY FROM UNITED, AND WHICH ALSO SUBJECT FIRM CUSTOMERS IN THIS STATE TO SUBSTANTIAL CURTAILMENTS AND REDUCED DELIVERIES WHILE UNFAIRLY ALLOWING ITS INTERSTATE PIPELINE CUSTOMERS AND THEIR FIRM AND INTERRUPTIBLE CUSTOMERS LOCATED IN OTHER STATES TO RECEIVE UNINTERRUPTED AND NORMAL GAS DELIVERIES DURING BOTH SUMMER AND WINTER MONTHS.

IT APPEARING THAT:

1. THE FEDERAL POWER COMMISSION NOW HAS PENDING BEFORE IT A CERTIFICATE PROCEEDING IN DOCKET NO. CP71-89 WHICH MAY RESULT IN THE TOTAL PREEMPTION OF THIS COMMISSION'S JURISDICTION OVER UNITED'S INTRASTATE SYSTEM AND A CONSOLIDATED CURTAILMENT PROCEEDING IN DOCKET NOS. RP71-29 AND RP71-120 WHICH MAY SUBJECT ALL OF UNITED'S DIRECT LOUISIANA CUSTOMERS, WHO HAVE NO OTHER SOURCE OF GAS SUPPLY, TO SEVERE AND UNDUE PREJUDICE AND DISADVANTAGE AND TO UNREASONABLE DIFFERENCES BETWEEN LOCALITIES IN THIS STATE AND IN OTHER STATES.

2. UNITED SUPPLIES 47.5% OF ALL NATURAL GAS USED IN LOUISIANA.

3. THE FEDERAL POWER COMMISSION HAS MADE EFFECTIVE, DURING THE PENDENCY OF THE ABOVE-MENTIONED PROCEEDINGS, THE CURTAILMENTS, REDUCED DELIVERIES, AND RATE INCREASES PROPOSED BY UNITED BEFORE REACHING ANY CONCLUSION THAT IT HAS NECESSARY AUTHORITY TO PERMIT UNITED TO RELIEVE ITSELF OF THE LAWFUL, AND CONTINUOUSLY EXERCISED JURISDICTION OF THIS COMMISSION.

4. UNITED SEEKS TO INVOKE THE AID OF THE FEDERAL POWER COMMISSION IN ORDER TO UNILATERALLY AND UNLAWFULLY ABROGATE FIRM, FIXED-PRICE, DIRECT SALES CONTRACTS WITH LOUISIANA CUSTOMERS.

5. UNITED HAS ADEQUATE GAS RESERVES TO SERVE ITS INTRASTATE SYSTEM WHICH IT SEEKS TO INEQUITABLY, UNJUSTLY, AND UNLAWFULLY DIVERT TO ITS INTERSTATE PIPELINE SYSTEM TO THE SEVERE AND IRREPARABLE DAMAGE AND INJURY OF ALL CLASSES OF ITS LOUISIANA CUSTOMERS.

6. REVIEW OF THE BRIEFS FILED BY THE PARTIES TO THE ABOVE-MENTIONED FPC PROCEEDINGS HAS LED THIS COMMISSION TO CONCLUDE THAT MANY MATERIAL AND CRITICALLY IMPORTANT FACTORS ARE NOT INCLUDED IN EITHER THE SCOPE OF THE ISSUES DEFINED BY THE FEDERAL POWER COMMISSION, OR BY THE EVIDENCE PRESENTED IN SUCH PROCEEDINGS.

NOW, THEREFORE, IT IS ORDERED THAT:

A. THE COMMISSION HEREBY INSTITUTES, PURSUANT TO ARTICLE 6, SECTIONS 4, 5, AND 6, OF THE LOUISIANA CONSTITUTION OF 1921, AS AMENDED, AND ALL PERTINENT PROVISIONS OF THE LOUISIANA REVISED STATUTES OF 1950, AS AMENDED, A PROCEEDING

ENTITLED, "EXAMINATION AND INVESTIGATION OF THE RATES, SERVICES, AND CURTAILMENT PRACTICES OF THE INTRASTATE PIPELINE SYSTEM OF UNITED GAS PIPE LINE COMPANY." THIS PROCEEDING SHALL ENCOMPASS A COMPLETE, COMPREHENSIVE, AND DETAILED EXAMINATION AND INVESTIGATION OF THE ACTIVITIES AND OPERATIONS OF UNITED, AND TO THE EXTENT RELATED THERETO, THOSE OF ITS PRODUCTION AFFILIATE, PENNZOIL PRODUCTION COMPANY, AND JOINT PRODUCTION VENTURES SUCH AS POGO AND SEA ROBIN, ITS PARENT, PENNZOIL UNITED, INC., AND ITS AFFILIATED DISTRIBUTION OUTLET, UNITED GAS, INC., IN PRODUCING, GATHERING, TRANSPORTING, SELLING, AND DISTRIBUTING, GAS PURCHASED OR PRODUCED WITHIN THE STATE OF LOUISIANA. THE PURPOSES TO BE SERVED BY THIS PROCEEDING ARE TO FIX AND REGULATE THE RATES CHARGED AND TO BE CHARGED, INCLUDING DEMAND CHARGES AND PENALTIES ON OVERRUNS, BY UNITED, AND TO FIX AND REGULATE THE SERVICES, INCLUDING CURTAILMENT PRACTICES AND GAS DELIVERY VOLUMES, RENDERED BY UNITED. THE COMMISSION WILL MAKE APPROPRIATE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ENTER ANY REMEDIAL ORDERS REQUIRED BOTH ON AN INTERIM BASIS AND AT THE CONCLUSION OF THIS PROCEEDING.

B. THE PROCEEDING SHALL INCLUDE, AMONG OTHERS, CONSIDERATION OF THE FOLLOWING SPECIFIC ISSUES:

I. WHETHER THIS COMMISSION'S JURISDICTION MAY LAWFULLY BE PREEMPTED BY THE FEDERAL POWER COMMISSION AND THE SELF-SERVING UNAUTHORIZED ACTIONS OF UNITED?

II. THE IMPACT OF AN ASSUMPTION OF JURISDICTION BY THE FEDERAL POWER COMMISSION OVER THE WHOLE, OR ANY PART, OF UNITED'S INTRASTATE SYSTEM UPON ALL CLASSES OF UNITED'S DIRECT LOUISIANA CUSTOMERS AND UPON THEIR RESPECTIVE CUSTOMERS, AND UPON THE PRESENTLY ADEQUATE INTRASTATE GAS RESERVES.

III. THE NECESSITY FOR EXPRESS PROHIBITIONS AGAINST EXISTING AND FURTHER COMMINGLING OF INTERSTATE OR OFF-SHORE GAS WITH INTRASTATE GAS BY UNITED, AND AGAINST EXISTING AND FURTHER INTERCONNECTIONS BETWEEN ITS INTRASTATE SYSTEM AND ITS INTERSTATE SYSTEM, THE INTERSTATE SYSTEM OF OTHER PIPELINES, OR WITH OUT-OF-STATE DISTRIBUTORS OR PRODUCERS OR INTRASTATE PIPELINES, DISTRIBUTORES OR PRODUCERS, AND

IV. ALL OTHER MATTERS AND THINGS CONNECTED WITH, CONCERNING, AND GROWING OUT OF THE RATES AND SERVICES OF UNITED OR UNITED, INC. WHICH ARE SUBJECT TO THE SUPERVISION, REGULATION, AND CONTROL OF THIS COMMISSION.

C. THIS COMMISSION HEREBY SETS 10:00 A.M., November 1, 1971, AS THE APPOINTED DATE FOR THE CONVENING OF AN INFORMAL PREHEARING CONFERENCE TO BE HELD AT THE COMMISSION'S OFFICES AT THE STATE CAPITOL BUILDING, BATON ROUGE, LOUISIANA TO DEAL WITH:

I. THE REQUEST OF THE COMMISSION STAFF FOR COMPREHENSIVE AND DETAILED INFORMATION, TO BE FURNISHED BY UNITED AND,

II. TO ESTABLISH DEFINITELY THE NATURE AND SCOPE OF THE EVIDENCE TO BE PRESENTED BY UNITED.

D. UNITED SHALL MAKE AVAILABLE TO THE COMMISSION STAFF, ON THE DATE OF SUCH CONFERENCE INFORMATION PERTAINING TO THAT PORTION OF ITS SYSTEM OPERATIONS MORE FULLY DESCRIBED AS THE GREEN SYSTEM EAST, GREEN SYSTEM WEST, AND THE PURPLE SYSTEM, ("INTRASTATE SYSTEM"), ALL AS SHOWN ON THE MAPS SUBMITTED BY UNITED GAS PIPE LINE COMPANY IN ITS FILING IN DOCKET NO. CP71-89 EXHIBIT F, THIS INFORMATION CONSISTING OF THE ITEMS SPECIFIED IN APPENDIX A OF THIS ORDER.

APPENDIX A

THE INFORMATION ITEMS REQUESTED SHALL BE FURNISHED FOR UNITED'S SYSTEM, BE SEPARATELY STATED FOR THE "INTRASTATE SYSTEM" (AS DEFINED IN THIS ORDER) AND THE INTERSTATE SYSTEM AND REFLECT CONDITIONS AS OF October 10, 1966, WHEN THE UNITED STATES SUPREME COURT DENIED CERTIORARI IN FLORIDA PARISHES; AS OF SEPTEMBER 17, 1970, WHEN THE FPC REQUESTED UNITED TO FILE INFORMATION RESPECTING THAT DECISION AND AS OF OCTOBER 1, 1970, WHEN UNITED APPLIED TO THE FPC FOR CERTIFICATION OF ITS INTRASTATE SYSTEM, AND AS OF THE DATE OF THIS ORDER.

1. ALL SOURCES OF GAS SUPPLY, INCLUDING AFFILIATE PRODUCTION, PRODUCER PURCHASES, GAS IMPORTS AND OTHER PIPELINES.
2. ALL "INTERCONNECTIONS", AS DEFINED IN ORDERING PARAGRAPH (D) OF THIS ORDER.
3. SYSTEMWIDE FLOW CHARTS SHOWING ORIGIN AND DESTINATION OF GAS, PIPELINE TRANSMISSION CAPACITY AND COMPRESSION, DIRECTION OF GAS FLOW AND NET BALANCES, AND UNDERGROUND STORAGE CAPACITY.
4. COPIES OF ALL CONTRACTS WITH PRODUCERS CONTAINING RESTRICTIONS AGAINST THE COMMINGLING OF GAS SUPPLIED THEREUNDER WITH "INTERSTATE GAS" AND/OR "OFFSHORE GAS", AS DEFINED IN ORDERING PARAGRAPH (E) OF THIS ORDER.
5. CURRENTLY EFFECTIVE AND PLANNED CURTAILMENT PROGRAMS (INCLUDING INTERRUPTIBLE AND FIRM LOAD SHEDDING PRIORITIES) AND CURRENT STATUS OF AVAILABLE SUPPLIES WITHIN LOUISIANA WHICH COULD INCREASE THE DELIVERABILITY OF THE INTRASTATE SYSTEM.
6. SIX COPIES OF THE RESPONSE FILED BY UNITED TO THE INFORMATION REQUEST OF THE FPC IN PHASES I AND II OF DOCKET NO. R-405, CONCERNING "RELIABILITY OF ELECTRIC AND GAS SERVICE", ISSUED NOVEMBER 4, 1970.
7. SIX COPIES OF ALL RATE FILINGS TO THE FPC MADE BY UNITED FROM 1963 - 1971, INCLUSIVE.

WITH RESPECT TO ITEMS 1 AND 2, ABOVE, SHOW SEPARATELY FOR EACH RESPECTIVE SOURCE AND INTERCONNECTION: THE DATE OF CONSTRUCTION AND ATTACHMENT, ANY AUTHORIZATION BY OR PENDING APPLICATIONS BEFORE THE FPC, DATE OF ANY SUCH APPLICATION, DOCKET NO. AND CITATION OF ALL FPC ORDERS AND OPINIONS RELATING THERETO AND THE REASON FOR ATTACHMENT OF SUCH SOURCE OR INTERCONNECTION.

WITH RESPECT TO ALL ITEMS, EXCEPT ITEM 4, SHOW FOR EACH SOURCE AND PIPELINE AND ALL INTERCONNECTIONS THERETO, THE RESPECTIVE TAKES DURING THE SUSTAINED HIGHEST THREE DAY COINCIDENTAL AND NONCOINCIDENTAL PEAK, ANNUAL VOLUMES AND RESERVE LIFE INDEX.

E. UNTIL THE FINAL CONCLUSION OF THIS PROCEEDING (INCLUDING ALL PHASES OF COURT REVIEW), OR WITHOUT FIRST OBTAINING THE PERMISSION AND AUTHORIZATION OF THIS COMMISSION, UNITED SHALL NOT FURTHER COMMINGLE ANY "INTERSTATE" OR "OFFSHORE GAS" WITH INTRASTATE GAS AND SHALL NOT MAKE ANY FURTHER "INTERCONNECTIONS" BETWEEN ITS INTRASTATE SYSTEM AND ITS INTERSTATE SYSTEM, THE INTERSTATE SYSTEM OF OTHER PIPELINES, OR OF OUT OF STATE DISTRIBUTORS OF PRODUCERS OR INTRASTATE PIPELINES, DISTRIBUTORS OR PRODUCERS. FOR THE PURPOSES OF THIS PARAGRAPH, "INTERSTATE GAS" AND "OFFSHORE GAS" SHALL MEAN ANY GAS DELIVERIES OR GAS FACILITIES CERTIFICATED (TEMPORARILY OR PERMANENTLY) OR EXEMPTED FROM SUCH CERTIFICATION BY THE FEDERAL POWER COMMISSION OR AS TO WHICH SUCH ACTION IS PENDING OR PRODUCED OUTSIDE OF THIS STATE, OR SOLD, EXCHANGED, OR TRANSPORTED TO ANY OTHER STATE.

F. UNITED SHALL PAY ANY AND ALL EXPENSES INCURRED BY THIS COMMISSION IN CONDUCTING THE PROCEEDING INSTITUTED BY THIS ORDER, INCLUDING THE EXPENSES AND FEES OF ENGINEERS, CONSULTANTS, ACCOUNTANTS, SPECIAL COUNSEL, AND CLERICAL ASSISTANCE SPECIALLY EMPLOYED THEREFOR. THE COMMISSION WILL CERTIFY TO UNITED, ON A MONTHLY BASIS, THE EXPENSES THUS INCURRED.

G. ANY PARTY OBJECTING TO ANY PROVISION OF THIS ORDER SHALL FILE WRITTEN OBJECTIONS THERETO ON OR BEFORE OCTOBER 7, 1971.

H. ANY PARTY SEEKING TO INTERVENE IN THIS PROCEEDING SHALL FILE A PETITION TO INTERVENE ON OR BEFORE OCTOBER 7, 1971

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
SEPTEMBER 28, 1971

John A. Hunt
CHAIRMAN

Clancy Dugas
COMMISSIONER

Ernest B. Jeanerette
COMMISSIONER

Patrick W. Pitcher
ASST. SECRETARY

APPENDIX S

LOUISIANA PUBLIC SERVICE COMMISSION

SPECIAL ORDER NO. 17-71
(ORDER AFFIRMING JURISDICTION AND TO SHOW CAUSE)

At a session of the Louisiana Public Service Commission held at Baton Rouge, Louisiana on November 17, 1971, consideration was given to the deliberate and wilful refusal of United Gas Pipe Line Company (United) to either comply, or attempt to comply with the provisions of this Commission's Special Order No. 7-71 and of its General Order dated September 30, 1971.

IT APPEARING THAT:

United has filed a Plea to jurisdiction denying that it is a Louisiana intrastate pipe line company and also filed a Motion For Stay requesting that the proceedings instituted by our Special Order No. 7-71 be delayed pending the issuance of a decision by the Federal Power Commission (FPC) in Docket No. CP71-89.

United asserts that its unilateral action in applying to the FPC for certification of its separate intrastate pipeline facilities and operations in southern Louisiana invokes the supremacy clause of the United States Constitution to terminate the sole and exclusive jurisdiction this Commission has continuously and lawfully exercised. No authority has been cited in support of this conclusion.

The doctrine of pre-emption is applicable only where Congress has enacted legislation designed to encompass all aspects of a particular field of regulation. But, Congress has not delegated to the FPC the full reach of its constitutional powers over interstate commerce. On the contrary, it authorized that agency to regulate only certain limited aspects of the transportation and sale for resale in interstate commerce of natural gas. Congress gave the FPC no authority at all over intrastate commerce (FPC v. Transcontinental Gas Corporation, 365 U.S.1, 17). Furthermore, Congress enacted Section 1 (c) of the Natural Gas Act in order to reserve regulation of intrastate pipelines and of local distribution systems entirely to state regulation. Plainly then, the FPC must defer to the states on matters which are primarily of local concern.

The supremacy clause is inapplicable unless and until a binding and final determination has been made that United's separate pipeline system in southern Louisiana is both in interstate commerce and outside the scope of the Hinshaw Amendment.

Such a determination cannot be made by the FPC. Only the courts can exercise the judicial function of determining the lawfulness of an assertion of jurisdiction by that agency in a particular proceeding. State regulation by this Commission will end therefor, if at all, only after the Federal Courts have made an adverse decision which is no longer subject to judicial review.

This Commission believes that during the pendency of such litigation it has both the authority and the duty to continue its regulation of United's rates and services. Many of United's southern Louisiana customers have not acknowledged and some are in fact actively challenging and contesting FPC jurisdiction. If this Commission were to accept United's suggestion that it refrain from exercising, to the extent appropriate under the circumstances, its duly granted statutory powers during the pendency of FPC administrative and federal court review proceedings, the citizens of the state will be deprived of the benefit of having an expert and informed local body control and supervise United's intrastate rates and services.

United's claim that this Commission's investigation deprives the FPC of ". . . an opportunity to make an initial determination of its jurisdiction under the Natural Gas Act . . ." is wholly untenable. Such an investigation has been held and both this Commission and the State of Louisiana have participated as parties. This Commission believes that as the administrative arm of a sovereign state, it has the same right as the FPC to investigate all relevant facts and circumstances and make an independent determination of whether or not under state law United is operating a separate intrastate pipeline.

Indeed, a state public utility commission has the right to investigate the operations of, and compel production of data from, even a foreign corporation engaged exclusively in interstate commerce within the state. Natural Gas Pipe Line Company of America v. Slattery, 302 U.S.300. Therefore, irrespective of the final outcome of the pending FPC proceedings, this Commission has the right to conduct its own investigation.

United's actions have already impaired, and will place in even greater future jeopardy, the availability of a reliable and adequate gas supply within the state. Its curtailment practices subject firm customers in this state to reduced deliveries while unfairly allowing its interstate pipeline customers and both their firm and interruptible customers located in other states to receive uninterrupted and normal gas deliveries during summer and winter. These are surely matters of vital local concern and the pending investigation and data requests bear directly upon them.

United also contends that this Commission's prohibition against further commingling of interstate gas with intrastate gas and further interconnections between United's interstate and intrastate pipeline systems is a constitutionally prohibited burden on interstate commerce. This argument is also wholly lacking in merit. The prohibition does not restrain exportation of natural gas produced in Louisiana to other states, which might directly burden interstate commerce. It does no more than prevent United from unilaterally and unlawfully transforming its separate southern Louisiana intrastate pipeline into an integrated portion of its interstate pipeline system. This Commission believes that United, as the operator of a state regulated intrastate pipeline, should purchase a larger and fairer share of its gas requirements for this separate system from onshore Louisiana production.

It appears that United is dedicating an excessive and unreasonable share of gas produced within this state to its interstate customers. Every producing state and the operator of every intrastate pipeline has a right to use locally produced gas in intrastate commerce. This does not invade any federal prerogative since Congress has not delegated to the FPC comprehensive and plenary powers to allocate the total national supply of natural gas between intrastate and interstate markets. Furthermore, the Commission's prohibition is not absolute but merely requires that United shall obtain its prior permission and authorization. Until such consent has been sought, and unreasonably denied, United has no ground for complaint.

United contends that compilation of the requested information will be costly and burdensome. It claims that the total costs incurred will be $524,088, of which $470,006 is attributable to preparation of noncoincidental peak data for its sources of gas supply. Thus, submission of all other requested items would involve a claimed total cost of $54,082. The Commission finds that this is an insignificant sum in comparison with the regulatory expense incurred by United in FPC proceedings. The Commission also notes that United has apparently misconstrued its intent with respect to noncoincidental peak data.

United was afforded in Special Order No. 7-71 the opportunity to file timely objections by October 7, 1971 for the very purpose of avoiding such misunderstandings. Had such objections been made, they could have been dealt with at the informal prehearing conference scheduled for November 1, 1971.

The Commission is rescheduling this conference and is confident that if United will attend, many of its alleged difficulties will be resolved. To the extent that any information sought may not be available without disproportionate expense, the Commission will make appropriate modifications to its data request.

NOW, THEREFORE, IT IS ORDERED THAT:

A. This Commission hereby sets 10:00 a.m., November 29, 1971 as the appointed date for the convening of an informal prehearing conference to be held at the Commission's offices at the State Capitol Building, Baton Rouge, Louisiana. United,

Mr. R. U. Haslanger, President, and Mr. C. C. Barnett, Senior Vice-President, shall appear at such conference together with such attorneys, technical experts, documents and data as they may require and produce all of the detailed information and documents needed to fully comply with the various items requested in Appendix A of the Special Order and paragraph A of the General Order. To the extent that such items cannot be made available on that day, there shall be produced all documents and information concerning the time and costs of full compliance with each such item.

B. United, Mr. Haslanger, and Mr. Barnett shall produce at such conference the following documents which require only the automated and mechanical reproduction of documents already in existence:

i. Items 4, 6, and 7 of said Appendix A.

ii. Four copies of all certificate applications to the FPC (other than budget type applications) made by United from 1963-1971, inclusive.

iii. Four copies of the system flow diagrams filed by United with the FPC for the years 1966-1970, inclusive, under Section 260.8 of its Regulations under the Natural Gas Act.

C. Until February 15, 1972, United shall produce for and allow an inspection and copying of the books, papers and other records of United, and to the extent related thereto, those of its production affiliates, Pennzoil Producing Company, United Offshore Company, Pennzoil Pipe Line Company and Sea Robin Pipeline Company and of its parent Pennzoil United, Inc. by producing them on request of and at a convenient place satisfactory to the Commission, its Special Counsel, staff members or other representatives.

D. United shall show cause why it, Mr. Haslanger and Mr. Barnett should not be held in contempt of this Commission for failure to perform the acts required in paragraphs A - C of this Order, in paragraphs D and F of the Special Order and paragraph A of the General Order or for any violation of the prohibition of paragraph E of the Special Order and paragraph B of the General Order.

E. United's Plea To Jurisdiction and Motion For Stay are lacking in merit and the relief requested therein is denied.

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
NOVEMBER 17, 1971

CHAIRMAN

COMMISSIONER

COMMISSIONER

SECRETARY

APPENDIX T

LOUISIANA PUBLIC SERVICE COMMISSION

SPECIAL ORDER NO. 27-71
(ORDER DENYING REQUEST FOR RELIEF
FROM OPERATING RESTRICTIONS)

At a session of the Louisiana Public Service Commission held at Baton Rouge, Louisiana, on November 29, 1971, consideration was given to the following facts:

This Commission adopted, on September 28, 1971, Special Order No. 1 which expressly prohibited United Gas Pipe Line Company (United) from further commingling interstate or offshore gas with intrastate gas and from making further interconnections between its separate intrastate system and its own or any other interstate system. The Commission's order also set for hearing the question of whether there was any need for an express prohibition against existing commingling and interconnections.

United was given the opportunity to file written objections to any provision of that order by October 7, 1971, but failed to do so. Subsequently, the Commission issued its Special Order No. 2 of November 17, 1971 which afforded United the opportunity to attend an informal conference on November 29, 1971 and show cause why it should not be required to comply with each of the provisions of said prior orders. United appeared at this conference and filed a "Statement and Request for Relief From Operating Restrictions" which asked the Commission to relieve it entirely from the prohibition against further commingling and interconnections. United will comply with all other provisions of said Orders, unless this Commission relieves it of such obligations.

This prohibition was designed to preserve the status quo during the pendency of litigation before the Federal Power Commission (FPC) and this Commission concerning the question of jurisdiction over United's separate intrastate Louisiana pipeline systems. It is necessary because certain parties in the FPC proceeding claim that that agency would acquire jurisdiction as a result of commingling or interconnections deliberately made by United for the purpose of rearranging its system in order to escape the jurisdiction of this Commission and converting its intrastate system to an interstate pipeline. The FPC has not yet rejected these contentions and may adopt this view.

During the informal conference of November 29, 1971, United advised this Commission that it would not make any new interconnections or change the pattern of commingling. United also advised the Commission that if abnormal weather conditions occur, it might be necessary for the purpose of meeting emergency needs to use greater volumes of interstate and offshore gas during the peak day for the current winter season than were used during the preceding winter season. United erroneously construes this Commission's order as prohibiting any increase in such peak day gas volumes. This Commission advised United that it had misconstrued the scope of the prohibition and requested it to enter into a stipulation that it would not take advantage of such emergency situations, by arguing that such emergency integration gave rise to federal jurisdiction in what would otherwise have been a separate intrastate system subject solely to state regulation. Such stipulations are conventional in litigation where parties

wish to preserve the status quo respecting their legal rights and duties and at the same time avoid unwarranted and unnecessary injury to innocent third parties. Here, vital public interests are involved which United has an affirmative duty to protect.

IT APPEARING THAT:

United's refusal to enter into such a stipulation is totally unjustifiable and unreasonable. Indeed, its refusal raises serious questions as to the sincerity of its conduct and motives.

United is absolutely mistaken in assuming that jurisdiction can be based upon a temporary emergency situation caused by nonrecurring cold weather conditions or by a gas shortage of unpredictable duration on its system. We will determine the question of whether United's pipeline system is a separate intrastate pipeline or an integral portion of its interstate pipeline system on the basis of objective facts and genuine operational necessities. No credence or weight will be given to self-serving and unilateral changes in operating modes or gas supply patterns which are wholly within the control of United and which may be artificially manipulated by it in order to advance its cause in the pending litigation before the FPC and this Commission. This Commission wishes to express its trust that the FPC will also disdain any reliance upon United's efforts to deliberately create an artificial and exaggerated gas shortage in its Southern Louisiana system for the purpose of showing a spurious integration.

United is seeking to wrongfully and unlawfully arrogate unto itself the basic decision of jurisdiction. A regulated public utility cannot thus usurp the functions and powers conferred upon either this Commission or the FPC.

The FPC has found that there is an emergency shortage of gas supplies and has authorized interstate pipelines to purchase gas from intrastate sources, such as producers and pipelines. It has specifically exempted intrastate gas companies engaged in such emergency gas supply arrangements from its jurisdiction. This Commission also finds that there is an emergency situation with respect to the shortage of gas supply and that this situation has been aggravated by United's improper refusal to use a fair share of locally produced gas for its separate intrastate system.

This Commission finds, as the FPC has also found, that jurisdiction cannot be based upon transitory and nonrecurring emergency situations. Accordingly, any increase in the volume of interstate and offshore gas used to meet emergency peak day needs will not be given any weight in determining United's status as an intrastate pipeline.

We will require United within ten days after each such purchase or other arrangement for the use of additional quantities of interstate or offshore gas to file a report setting forth the details of each such transaction. These reports will be carefully evaluated and reviewed to ensure that United does not take advantage of these emergency conditions as a

pretext to advance and strengthen its claim that the FPC has acquired jurisdiction over the separate intrastate pipeline which has been always regulated solely and exclusively by this Commission.

United seeks to be relieved entirely of the prohibition against further commingling and interconnections although the emergency situation which it relies upon affects only the operation of this prohibition with respect to peak day volumes as to which there is no problem. Accordingly, United's request is unnecessary and unwarranted.

We note that the FPC has authorized intrastate producers to sell spot gas for emergency use to interstate pipelines. The owner and operator of an intrastate gas pipeline has both the right and the duty to purchase such intrastate gas to meet peak day needs and other emergency gas shortage situations. We do not believe it equitable that the FPC should authorize interstate pipelines to purchase intrastate gas while asserting that the use of interstate gas by an intrastate pipeline will cause a state regulatory body to lose its jurisdiction. Certainly, considerations of comity and fairness would appear to require a contrary result. Accordingly, the Commission will direct United to use intrastate gas to the maximum extent available for the purpose of meeting peak day and other emergency needs.

NOW, THEREFORE, IT IS ORDERED THAT:

A. The relief requested by United's Statement and Request for Relief from Operating Restrictions is unnecessary, as well as unwarranted, and is hereby denied.

B. Before increasing the volumes of interstate or offshore gas used in the 1970-1971 winter season, United shall purchase intrastate spot gas to meet emergency peak days needs and other emergency gas shortage situations.

C. Where the use of interstate or offshore gas is necessary in order to avoid or minimize serious curtailment of service occasioned by abnormally cold weather conditions or unusual or unexpected demand, and where such arrangements are limited to a single period of not more than 60 days:

(i) United may increase the 1970-1971 winter season peak day quantities of interstate or offshore gas flowing through existing interconnections and resulting from existing patterns of commingling which were in effect on September 28, 1971.

(ii) United shall, however, in each such instance so advise the Commission immediately by telegram or letter stating briefly the circumstances and shall within ten (10) days after each such transaction file a statement in writing and under oath, together with four conformed copies thereof, setting forth the purpose and character of the increased interstate volumes, the purchase or exchange and transportation of the gas volumes involved, the price being paid, the facts warranting invocation

of the emergency authority granted in this paragraph, and the anticipated period of the stated emergency. This Commission will review and evaluate each such report in order to insure that United does not take advantage of alleged emergency conditions as a pretext to artificially manipulate and rearrange its system and gas flows thereunder for the purpose of lending substance to its claim that its intrastate systems are an integral part of its interstate pipelines.

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
NOVEMBER 29, 1971

/s/ John S. Huht.
CHAIRMAN

/s/ Ernest S. Clements
COMMISSIONER

/s/ Nat B. Knight, Jr.
COMMISSIONER

/s/ Marshall B. Brinkley
ASSISTANT SECRETARY

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Nos. 71-1016 and 71-1040

Supreme Court, U. S.
FILED
APR 15 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner

v.

LOUISIANA POWER & LIGHT CO., ET AL.

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC.,
Petitioners

v.

LOUISIANA POWER & LIGHT CO., ET AL.

On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR UNITED AND PENNZOIL

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